Supreme Court, U.S.
FILED

No. 941519 MAR 14 1995

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DAVID LIPSCOMB UNIVERSITY,
Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

JUSTIN P. WILSON
JAMES W. WHITE
WALLER LANDSEN DORTCH & DAVIS
Nashville City Center
Suite 2100
511 Union Street
Nashville, Tennessee 37219

REX E. LEE *
CARTER G. PHILLIPS
SUSAN A. WEBER
ERIC H. SUSSMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

March 14, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether municipal or state taxpayers asserting a claim under the Establishment Clause may establish Article III standing without proof of actual or imminent injury in fact that is directly related to the government action of which they complain.

PARTIES TO THE PROCEEDING

Petitioner is David Lipscomb University.* Respondents are Harold E. Steele; Americans for Religious Liberty; Rev. Tom Baker, Jr.; Rev. David Maynard; Don Peterson; and Harmon Wray.

Parties that participated in the proceedings below but who are not listed in the caption of the case in this Court are the following:

> The Industrial Development Board of the Metropolitan Government of Nashville and Davidson County;
>
> The Metropolitan Government of Nashville and Davidson County;
>
> Sovran Bank; and
>
> Sovran Bank/Tennessee.

---

* David Lipscomb University is not a subsidiary or affiliate of a publicly-owned corporation.

NationsBank Corporation, a publicly owned corporation not a party to this litigation, has a financial interest in its outcome. Specifically, Sovran Bank/Tennessee, a named defendant in this action, issued a $15,969,453 irrevocable letter of credit for the account of David Lipscomb University to secure repayment of the principal and interest due on the industrial development bonds that are the subject of the litigation. NationsBank of Tennessee, N.A., has succeeded to the obligation of Sovran Bank/Tennessee under the letter of credit. NationsBank of Tennessee, N.A., is a wholly-owned subsidiary of NationsBank Corporation. In the event the bonds are declared invalid as a result of this litigation, the trustee for the bondholders will be entitled to present a demand for payment under the letter of credit to NationsBank of Tennessee for the benefit of the bondholders. David Lipscomb University is unconditionally obligated to reimburse NationsBank of Tennessee, N.A., for any amounts paid under the letter of credit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

	Page
Allen v. Wright, 468 U.S. 737 (1984)	11
ASARCO Inc. v. Kadish, 490 U.S. 605 (1989)	11, 15, 16
Bowen v. Kendrick, 487 U.S. 589 (1988)	9, 17
Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992)	14
Colorado Taxpayers Union, Inc. v. Romer, 963 F.2d 1394 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1360 (1993)	16
District of Columbia Common Cause v. District of Columbia, 858 F.2d 1 (D.C. Cir. 1988)	13, 14
Doremus v. Board of Education, 342 U.S. 429 (1952)	16, 17
Frazer v. Carr, 360 S.W.2d 449 (1962)	4
Freedom from Religion Found., Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988)	14
Frothingham v. Mellon, 262 U.S. 447 (1923)	12
Gonzales v. North Township of Lake County, 4 F.3d 1412 (7th Cir. 1993)	14
Hawley v. City of Cleveland, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986)	8
Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984)	16
Hunt v. McNair, 413 U.S. 734 (1973)	8, 9, 17
Lee v. Weisman, 112 S. Ct. 2649 (1992)	9
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)	11, 13, 14, 16
Rocks v. City of Philadelphia, 868 F.2d 644 (3d Cir. 1989)	13
School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)	9, 17
Sierra Club v. Morton, 405 U.S. 727 (1972)	15
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976)	16
Taub v. Commonwealth of Kentucky, 842 F.2d 912 (6th Cir.), *cert. denied*, 488 U.S. 870 (1988)	16, 17
United States v. City of New York, 972 F.2d 464 (2d Cir. 1992)	13, 15

TABLE OF AUTHORITIES—Continued

	Page
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	*passim*
Warth v. Seldin, 422 U.S. 490 (1975)	15
Whitmore v. Arkansas, 495 U.S. 149 (1990)	11
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. Const. art. III, § 2, cl. 1	*passim*
U.S. Const. amend. I	*passim*
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1292(b)	9, 10
STATE STATUTES	
Tenn. Code Ann. §§ 7-53-101 *et seq.*	3
Tenn. Code Ann. § 7-53-101(11)(A)	4
Tenn. Code Ann. § 7-53-101(11)(A)(vii)	5
Tenn. Code Ann. § 7-53-102	4
Tenn. Code Ann. § 7-53-102(a)	4
Tenn. Code Ann. § 7-53-102(c)	4
Tenn. Code Ann. § 7-53-302(9)	4
Tenn. Code Ann. § 7-53-303	4
Tenn. Code Ann. § 7-53-306	5
Tenn. Code Ann. § 67-2-119	6
1955 Tenn. Pub. Acts ch. 209, § 3	4
OTHER AUTHORITIES	
Robert J. Morse *et al.*, *Getting the Most for Your Money (U.S. News Best College Values)*, U.S. NEWS AND WORLD REPORT, Oct. 11, 1993, at 97	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. ———

DAVID LIPSCOMB UNIVERSITY,
Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

David Lipscomb University hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The November 1, 1994 opinion of the court of appeals appears at pages 1a to 3a of the Appendix. The opinion is not reported. The January 7, 1992 Report and Recommendation of the Magistrate that David Lipscomb University's Motion for Summary Judgment be granted on the ground that plaintiffs lacked standing under Article III of the United States Constitution appears at pages 24a to 29a of the Appendix. The July 16, 1992 memorandum decision of the district court rejecting the magistrate's re-

port and denying defendants' motion for summary judgment appears at pages 4a to 16a. The November 16, 1992 memorandum decision and December 4, 1992 order of the district court denying defendants' motion for reconsideration and certifying the court's summary judgment order for immediate appeal pursuant to 28 U.S.C. 1292(b) appear at pages 17a to 23a. The recommendations of the magistrate and the memoranda of the district court are not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1994. Rehearing was denied on December 14, 1994. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution of the United States provides that:

> The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizen of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 2.

The First Amendment to the Constitution of the United States provides, in relevant part, that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

U.S. Const. amend. I.

Pertinent provisions of the Tennessee Industrial Development Corporation Act, Tenn. Code Ann. §§ 7-53-101 *et seq.* are reproduced at pages 39a to 52a of the Appendix. Sections 67-2-102 and 67-2-119 of the Tennessee Tax Code appear at page 55a.

STATEMENT

1. This dispute arises from the issuance of tax exempt government bonds to finance capital improvements on the campus of a church-related university. Petitioner David Lipscomb University ("the University") is a private, coeducational liberal arts institution with an enrollment of approximately 2,500 students. App. 4a, 25a. It is affiliated with the Church of Christ. App. 2a, 4a.[1] The University is undertaking an expansion and development of its Nashville, Tennessee campus by adding the following facilities:

- a new 63,000 square foot library
- a new 36,000 square foot intramural athletics building
- a new baseball field, eight new tennis courts, and a field for intramural sports
- new parking facilities
- a new fine arts facility

---

[1] The University has received national recognition in *U.S. News and World Report*, where it was ranked as a "best college value" for prospective students. To be considered a "best value," a college or university had to finish "at or near the top of its category in this year's U.S. News rankings of academic quality." Robert J. Morse *et al.*, *Getting the Most for Your Money (U.S. News Best College Values)*, U.S. News and World Report, Oct. 11, 1993, at 97.

- a 16,000 square foot addition to the business administration building
- a new 24,000 square foot dormitory
- a 10,000 square foot addition to the dining hall
- renovation of the existing library into space for administrative offices

App. 5a, 25a.

The construction work has been financed by the sale of $15 million in tax-free Educational Facilities Revenue Refunding Bonds issued by the Industrial Development Board ("the Board") of the Metropolitan Government of Nashville and Davidson County.[2] The Board is authorized, pursuant to Tennessee's Industrial Development Corporation Act, to issue tax-exempt bonds to foster a wide range of development projects. *See* Tenn. Code Ann. §§ 7-53-101(11)(A), 7-53-102, 7-53-302(9), 7-53-303 (App. 39a-49a).[3] In particular, the Board may issue bonds for the development projects of "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including, but not limited to, classroom, laboratory, housing, administrative, physical education, and medical

---

[2] The Metropolitan Government is a municipal corporation chartered under the laws of Tennessee and is the consolidated city-county government for Nashville and Davidson County. *See Frazer v. Carr*, 360 S.W.2d 449 (1962).

[3] The stated purpose of the Industrial Development Corporation Act is to "maintain and increase employment opportunities, increase the production of agricultural commodities, and increase the quantity of housing available in affected municipalities by promoting industry, trade, commerce, tourism and recreation, agriculture and housing construction by inducing manufacturing, industrial, governmental, educational, financial, service, commercial, recreational and agricultural enterprises to locate in or remain in this state . . . ." Tenn. Code Ann. § 7-53-102(a) (App. 40a). *See also id.* § 7-53-102(c) (App. 40a-41a); 1955 Tenn. Pub. Acts ch. 209, § 3 (App. 53a).

research and treatment facilities." *Id.* § 7-53-101(11)(A)(vii) (App. 39a-40a).

The bonds for the David Lipscomb University capital improvement project were issued in early 1991. They impose no financial obligation upon the Board or upon any other government entity. App. 6a; Tenn. Code Ann. § 7-53-306 (App. 50a-51a).[4] The bonds are secured by an irrevocable letter of credit issued by Sovran Bank/Tennessee for the account of the University to Sovran Bank, N.A., as trustee for the bondholders. App. 5a. The University is unconditionally obliged to reimburse Sovran Bank/Tennessee for any amounts drawn under that letter of credit. No state or local government tax revenues have been or ever will be spent as a result of the issuance of the bonds. App. 6a.

Finally, to assure that bond revenues are not used to finance religious instruction or the construction of sectarian facilities, the bond documents include an important restrictive covenant. They prohibit the University from using

> the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

App. 32a. *See also* App. 25a.

---

[4] Section 7-53-306 of the Tennessee Code (App. 50a-51a) provides, in relevant part:

> The municipality shall not in any event be liable for the payment of the principal of or interest on any bonds of the corporation, or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever which may be undertaken by the corporation, and none of the bonds of the corporation or any of its agreements or obligations shall be construed to constitute an indebtedness of the municipality within the meaning of any constitutional or statutory provision whatsoever.

2. On May 30, 1991, respondents Harold E. Steele, Americans for Religious Liberty,[5] Rev. Tom Baker, Jr., Rev. David Maynard, Don Peterson, and Harmon Wray filed a complaint in the United States District Court for the Middle District of Tennessee seeking, *inter alia*, (a) a declaration that issuance of the bonds violated the Establishment Clause of the First Amendment, and (b) an injunction prohibiting the Metropolitan Government and the Board from issuing bonds for the benefit of other sectarian institutions in the future. App. 4a. Respondents claimed standing to sue as citizens and as state and municipal taxpayers who "have an interest that their local governmental body not subsidize religious institutions." App. 6a. Respondents have explained their attenuated theory of taxpayer standing as follows:

> [H]ad David Lipscomb University elected to pursue its campus development through the use of taxable educational revenue bonds, then purchasers of said bond, issued in $5,000 denominations, would most likely reside in the Middle Tennessee area and, therefore, could have paid Hall State Income Tax on the interest received from said bonds. This tax revenue would then be allocated between the state and counties where the bond holders resided. A reasonable inference is created that some bondholders would reside in Davidson County, thereby causing some portion of this tax revenue to be apportioned to the Metropolitan Government. T.C.A. § 67-2-119 [App. 55a.[6]]

On August 20, 1991, the University filed a motion for summary judgment in which all defendants joined, assert-

---

[5] Americans for Religious Liberty, an Illinois not-for-profit corporation, joined the action on behalf of its members in Tennessee, including respondents Steele and Peterson. It has asserted no interest in the litigation distinct from that asserted by the individual respondents.

[6] Brief of Plaintiffs-Appellees at 12-13, *Steele v. Industrial Development Board* (6th Cir. 1994) (No. 93-5350).

ing that respondents lack standing under Article III of the United States Constitution. On January 7, 1992, a magistrate recommended that the motion be granted. App. 24a-29a. He specifically found that there was no evidence that issuance of the bonds harmed municipal coffers. App. 29a.

The district court then granted respondents leave to depose the University's chief financial officer, James C. Allen, for the purpose of developing evidence on the question of whether the University would have issued taxable bonds to finance its campus expansion project had industrial development bond financing not been available. App. 34a. Mr. Allen testified that the University rejected the option of using conventional taxable bonds to finance the project because the interest cost of such financing was too expensive for the University to afford:

> Q. If tax exempt financing, through the Industrial Development Board, had not been possible . . . would this same project have been financed in some other way?
>
> . . .
>
> A. . . . No, it wouldn't have been. In fact, at the time that we made the request to Sovran, for instance, they had other products available, which we told them were not under consideration. Because, quite frankly, they would have put our percentage of debt amortization so much above what we could afford, that it just was not a consideration.

App. 37a.

Nevertheless, on July 16, 1992, the district court rejected the Magistrate's Report and Recommendation and respondents had standing as taxpayers to challenge the denied the motion for summary judgment, ruling that issuance of the bonds. App. 4a-16a.[7] The principal basis

---

[7] The district court rejected respondents' claim of citizen standing. App. 14a-15a.

of the decision was the court's conclusion that "[t]he issuance of the tax-exempt bonds to the University will reduce the revenue flowing into the Metropolitan Government's coffers." App. 10a-11a. Although the court did not dispute that the actual before-and-after tax consequences of the bonds had been revenue neutral, the court speculated that "the University would have turned to taxable means to fund the project" if industrial development bond financing had not been available. App. 11a. The court held that this prospect was sufficient to meet the "lower threshold" for municipal taxpayer standing recognized by the Sixth Circuit in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).[8]

In the alternative, the district court ruled that respondents had standing because "[t]he Supreme Court has consistently recognized a low threshold for state taxpayer standing in Establishment Clause cases, particularly when the state aid challenged is flowing to nonpublic schools." App. 11a. The district court based this conclusion on *Hunt v. McNair*, 413 U.S. 734 (1973), in which this Court rejected on the merits an Establishment Clause challenge to the issuance of tax exempt bonds "to assist

---

[8] In *Hawley*, plaintiffs challenged the lease of airport space to the Catholic Diocese of Cleveland for use as a chapel. The Sixth Circuit held that plaintiffs had standing because they claimed "impairment of their beneficial use of a public facility which they frequently use." 773 F.2d at 740 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 n.22 (1982)). The court of appeals also addressed plaintiffs' claims of municipal taxpayer standing. Plaintiffs alleged that the chapel space was rented to the diocese at a reduced rate, thereby granting the diocese an apparent subsidy from the City. The City responded that it was actually increasing its revenues by renting the space, which had previously been used only for storage and as a first-aid station. The court of appeals concluded that the record did "not contain sufficient facts to enable us to determine whether the rental harms the public purse, or whether it actually helps it . . . ." and therefore held that this issue should be resolved in the first instance by the district court. *Id.* at 738.

institutions for higher education in the construction, financing and refinancing of projects." *Id.* at 736.[9] The district court reasoned that, although *Hunt* did not discuss standing, it has become a standing case "through implication" because it was subsequently cited in standing discussions in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985), and *Bowen v. Kendrick*, 487 U.S. 589, 619 (1988). App. 13a. The district court then stated that "under *Hunt*, it apparently makes no difference whether or not plaintiffs can show a loss of revenue to the state or municipality or whether plaintiffs can show that tax dollars will be spent or lost." App. 13a.

The University moved the district court to reconsider its decision or, in the alternative, to certify the July 16, 1992 order for appeal pursuant to 28 U.S.C. § 1292(b). The district court refused to reconsider, stating that, "under several Supreme Court rulings, directness of injury has not been a requirement for standing." *See* App. 18a (citing *Warth v. Seldin*, 422 U.S. 490 (1975), and *Bob Jones University v. United States*, 461 U.S. 574 (1983)). The court also cited *Lee v. Weisman*, 112 S. Ct. 2649 (1992), for the proposition that "the underlying threat of injury need not be imminent, nor even absolutely certain." App. 19a. The district court explained its reasoning as follows:

> In *Weisman*, the Supreme Court found that the Establishment Clause protects a public high school student from being persuaded or compelled to partici-

---

[9] More specifically, in *Hunt*, this Court upheld the constitutionality of the South Carolina Educational Facilities Act, which permitted secular institutions to finance the construction of buildings and facilities from the proceeds of revenue bonds issued by a State authority. The South Carolina Act specifically precluded any facility or project funded under the Act from being used for sectarian instruction or religious worship. Neither the State nor the Authority was obligated under the Act to pay the principal of or the interest on the bonds, and the Authority was funded solely from the revenues of the project. 413 U.S. at 734.

> pate in a religious exercise years hence; by analogy, this Court finds that the Establishment Clause protects plaintiffs from being compelled to support sectarian educational institutions through future tax increases.

App. 19a.

The Court also rejected petitioner's argument that it was entitled to judgment because respondents had failed to present evidence that the University would have resorted to the issuance of taxable bonds. The Court stated that "[p]laintiffs have argued that the loss of tax revenue is neither conjectural nor hypothetical, and they shall be allowed an opportunity to prove their allegation." App. 20a (footnote omitted). The district court did, however, amend its previous order to permit petitioner to apply for permission to appeal pursuant to 28 U.S.C. § 1292(b). App. 21a-23a.

3. The court of appeals granted petitioner's motion for leave to appeal and then affirmed in a per curiam opinion that adopted the reasoning of the district court. App. 1a-3a. The court of appeals specifically approved the district court's reliance on *Hawley*, stating that any "allegation" that a city's action might produce a future loss of revenues "was sufficient to 'give [respondents] standing as municipal taxpayers to defend the public treasury.'" App. 2a (quoting *Hawley*, 773 F.2d at 741). The court of appeals also expressly approved the district court's reliance on *Hunt v. McNair* as a basis for finding standing. App. 3a.[10]

---

[10] In so doing, however, the Sixth Circuit misstated the basic holding of *Hunt*. The court stated that *Hunt* "invalidated a South Carolina law permitting the issuance of industrial revenue bonds 'to assist institutions of higher education in the construction, financing, and refinancing of projects to the extent that it permitted issuance of such bonds on behalf of a religious college." App. 3a. In fact, *Hunt* upheld the South Carolina statute. *See supra*, note 9.

Petitioner's request for rehearing was denied on December 14, 1994. App. 30a.

REASONS FOR GRANTING THE PETITION

This Court has consistently rejected "the idea that the judicial power requires nothing more for its invocation than important issues and able litigants." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 489 (1982). Rather, a plaintiff must demonstrate that he or she has suffered injury in fact—an actual or imminent harm that is concrete and "affect[s] the plaintiff in a personal and individual way," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 & n.1 (1992)—and that the alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Valley Forge*, 454 U.S. at 471. These elements—injury to the plaintiff, causation, and redressability—form the "irreducible minimum" requirements for Article III standing. *Valley Forge*, 454 U.S. at 472; *Lujan* 112 S. Ct. at 2136.

Here, however, the district court and the court of appeals have written these "irreducible minimum" requirements out of the law. They have held that municipal taxpayers and state taxpayers who raise Establishment Clause claims may come before the federal courts without showing injury of any kind. That is simply wrong. In *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989), a plurality of this Court stated that municipal taxpayers must show "direct and immediate injury" in order to establish standing. *Id.* at 613. The plurality also reiterated that state taxpayers must establish "direct injury." *Id.* (quoting *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952)). This Court has never held—as the lower courts did here—that state taxpayers may trump

the requirements of Article III simply by asserting a claim under the Establishment Clause.

This Court has labored to develop a coherent and consistent body of law governing Article III standing. *See Valley Forge*, 454 U.S. at 475-76 (acknowledging inconsistency in some of the Court's earlier standing decisions). Those efforts are undermined by the decision of the Sixth Circuit—and others like it—that treat taxpayer standing claims as exceptions to the fundamental requirements of Article III. The Court should grant certiorari and reaffirm that the "irreducible minimum" requirements of Article III apply to *all* cases brought in federal court—including claims brought by municipal and state taxpayers under the Establishment Clause.

1. The confusion regarding municipal taxpayer standing results from an overly expansive reading of a 70-year-old decision. *Frothingham v. Mellon*, 262 U.S. 447 (1923), held that a plaintiff cannot establish standing to challenge government actions simply by asserting that he or she is a federal taxpayer. The opinion contrasts the "remote" interest of a taxpayer challenging federal action with the more "direct and immediate" interest of a taxpayer challenging municipal action, saying:

> *The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate* and the remedy by injunction to prevent their misuse is not inappropriate. . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation.

Id. at 486-87 (emphasis added). Based on this passage in *Frothingham*, some lower courts have relieved municipal taxpayer plaintiffs of the burden of establishing any of the elements of Article III standing. *But cf. Lujan*,

112 S. Ct. at 2136 (proof of standing is "an indispensable part of the plaintiff's case").

Indeed, the Second Circuit has stated that the mere fact of being a municipal taxpayer raises a *presumption* of injury in fact. In *United States v. City of New York*, 972 F.2d 464 (2d Cir. 1992), the Second Circuit held that a municipal taxpayer had standing to challenge the city's procedure for awarding sludge removal contracts. The Court acknowledged that "[t]he speculative possibility that [plaintiff] might have to pay higher taxes because the City spent too much on these waste disposal contracts does not seem like the 'distinct and palpable injury' required by the standing doctrine." *Id.* at 470 (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). But the Court concluded that, "under *Frothingham*, we *presume* a municipal taxpayer's relationship to the municipality is 'direct and immediate' such that the taxpayer suffers concrete injury whenever the challenged activity involves a measurable appropriation or loss of revenue." *Id.* (emphasis added).[11]

Similarly, the Court of Appeals for the District of Columbia Circuit has stated that *Frothingham* defined "the municipal taxpayer's injury as the 'misuse' of municipal funds." *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988). By so characterizing the "injury," the court absolved the municipal taxpayer of any obligation to prove a "concrete and particularized" interest in the case. *Lujan*, 112 S. Ct. at 2136; *Valley Forge*, 454 U.S. at 482. The municipal "taxpayer need not show that the specific taxes

[11] Significantly, the Second Circuit noted that, "if we were writing on a clean state, we might be inclined to find that [the plaintiff] lacks standing. . . . However, we see nothing . . . to convince us that *Frothingham*'s view of municipal taxpayer standing is still not good law." *United States v. City of New York*, 972 F.2d at 470-71. *Compare Rocks v. City of Philadelphia*, 868 F.2d 644, 647-48 (3d Cir. 1989) (relying on prudential considerations as a basis for finding a lack of standing in a municipal taxpayer case).

he paid were used unlawfully, nor that his taxes will be reduced as a result of the judgment." *District of Columbia Common Clause*, 858 F.2d at 5. He need only allege some impact on the municipal till.[12]

The Sixth Circuit in this case has even gone beyond the positions taken by the Second and District of Columbia Circuits. In *Hawley*, the Court flatly stated that "the Supreme Court continues to allow suits by non-federal taxpayers to enjoin unconstitutional acts affecting public finances." 773 F.2d at 742 (dictum). And in the present case, the court of appeals has gone even farther, by adopting the district court's conclusions that "directness of injury" was not required, that "the underlying threat of injury need not be imminent," and—most egregiously—that "it makes no difference whether or not plaintiffs can show a loss of revenue to the state or municipality." App. 18a, 19a, 13a.

Under this reasoning, respondents were required to prove no injury whatsoever. The mere assertion that they are municipal taxpayers was sufficient to establish standing. Such an approach cannot be squared with decisions that treat proof of a concrete, particularized, and actual or imimnent injury in fact as part of the "irreducible constitutional minimum of standing." *Lujan*, 112 S. Ct. at

---

[12] In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), the Seventh Circuit declared that under Article III, a plaintiff must have a "personal stake in that case or controversy [to have] standing. This personal stake can be established only if the plaintiff has suffered an *injury in fact*." *Id.* at 1415 (citations omitted) (emphasis added). Nevertheless, the court stated that municipal taxpayers need only allege that tax dollar expenditures "contribute to Establishment Clause violations." *Id.* at 1416. *See also Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992) (municipal taxpayer standing is "available when there is an expenditure of municipal funds challenged"); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1469-70 (7th Cir. 1988) (municipal taxpayer may challenge unconstitutional acts that "affect public finances").

2136. *See also Valley Forge*, 454 U.S. at 472; *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41 n.16 (1972).

The *ASARCO* plurality appears to have recognized this problem and attempted to bring the runaway doctrine of municipal taxpayers standing into line with Article III precedents. The plurality stated that municipal taxpayers —like all other plaintiffs—should be required to prove a "direct and immediate" interest in order to establish standing:

> As an ordinary matter, suits premised on federal taxpayer standing are not cognizable in the federal courts . . . .
>
> We have indicated that the same conclusion may not hold for municipal taxpayers, if it has been shown that the "peculiar relation of the corporate taxpayer to the [municipal] corporation" makes the taxpayer's interest in the application of municipal revenues "direct and immediate." *Frothingham*, [262 U.S.] at 486-87.

490 U.S. at 613.

The Court should grant certiorari to finish the job that the *ASARCO* plurality started [13] and to make it clear that the fundamental requirements of Article III apply to all cases brought in federal court, including those in which the litigants style themselves municipal taxpayers.[14]

---

[13] *See United States v. City of New York*, 972 F.2d at 471 ("the plurality would replace the *Frothingham* presumption with a requirement that the municipal taxpayer establish a close connection to the municipal fisc. A majority of the Supreme Court has not yet done so. It is not our job to anticipate that the ASARCO plurality will garner a fifth vote").

[14] The issue of respondents' standing is well-presented in this case. In the court of appeals, respondents relied principally on two facts: (1) an accreditation body had encouraged the University to undertake two of the nine projects financed by the bond issue; and (2) the University had previously secured two much smaller

2. The Court should also grant certiorari to review the lower courts' conclusion that state taxpayers need cross only a "low threshold" to assert claims under the Establishment Clause. App. 11a, 2a-3a.

Forty years ago, this Court held that state taxpayers could establish standing only by pleading and proving a "direct injury." *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952). *See also ASARCO*, 490 U.S. at 613-14. In *Taub v. Commonwealth of Kentucky*, 842 F.2d 912 (6th Cir.), *cert. denied*, 488 U.S. 870 (1988), the Sixth Circuit agreed that a state taxpayer-plaintiff, like a federal taxpayer-plaintiff, must "allege more than 'merely that he suffers in some indefinite way in common with people generally.'" *Id.* at 912 (quoting *Doremus*, 342 U.S. at 434). Specifically, such a plaintiff must "tie . . . allegations of illegal appropriations and expenditures to a specific claim of some direct and palpable injury threatened or suffered." *Id.* The court of appeals recognized that this approach "'parallel[s] the core article III injury-in-fact requirement.'" *Id.* (quoting *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1183 (9th Cir. 1984) (Wallace, J., dissenting)).[15] However, the Sixth Circuit limited its holding

---

loans through taxable financing mechanisms. From these facts, respondents argued that the University would have undertaken a major capital improvements project with taxable financing and that some of the taxes would have returned to the state and the metropolitan area. *See supra*, at 6. This logic is completely attenuated. Moreover, it is refuted by the Allen deposition. App. 37a; *supra*, at 7. There are no facts "on the basis of which it could reasonably be found that concrete injury to [respondents] was . . . certainly impending." *Lujan*, 112 S. Ct. at 2140 n.3. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). Respondents' argument is sheer speculation. And speculation does not establish standing. *Lujan*, 112 S. Ct. at 2136-37.

[15] In *Hoohuli*, the Ninth Circuit concluded that state taxpayer standing is easier to establish than federal taxpayer standing. 741 F.2d at 1180. *But see Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1402 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1360 (1993) (rejecting Ninth Circuit standing test and requiring

in *Taub* to "those cases where violation of the Establishment Clause is not alleged." *Id.* at 918. In the present case, where a violation of the Establishment Clause *has been* alleged, the Sixth Circuit has concluded that a different and much less stringent standard applies.

To justify this decision, the court of appeals has noted that this Court reached the merits in a factually similar case, *Hunt v. McNair*, 413 U.S. 734 (1973). Accordingly, the Sixth Circuit adopted the district court's conclusion that, "under *Hunt*, it apparently makes no difference whether or not plaintiffs can show a loss of revenue to the state or municipality or whether plaintiffs can show that tax dollars will be spent or lost." App. 13a. The court of appeals then observed that *Hunt* has been cited in the standing discussions of two subsequent decisions, *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Bowen v. Kendrick*, 487 U.S. 589 (1988). App. 3a.[16]

If *Hunt*, *Ball*, and *Bowen* can be read as authorizing a departure from Article III criteria for Establishment Clause cases, they are in conflict with this Court's decision in *Valley Forge*, 454 U.S. 464.[17] *Valley Forge* explicitly rejected the proposition that plaintiffs raising Establishment Clause claims need not meet the requirements of Article III:

---

state taxpayer to show "that a distinct and palpable injury resulted from the allegedly illegal appropriation or expenditure" and that state taxpayer suffered a "monetary loss . . . on his tax liability").

[16] In *Ball*, the Court affirmed a finding of standing "relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." 473 U.S. at 380 n.5. In *Bowen*, the Court stated that "we have not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges." 487 U.S. at 619.

[17] *Valley Forge* was a federal taxpayer case; however, this aspect of its reasoning applies equally to state taxpayer claims. *Doremus*, 342 U.S. at 434.

> Implicit in [such reasoning] is the philosophy that the business of the federal courts is correcting constitutional errors, and that "cases and controversies" are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor. *This philosophy has no place in our constitutional scheme. It does not become more palatable when the underlying merits concern the Establishment Clause.*

454 U.S. at 489 (emphasis added). These seemingly divergent lines of authority warrant resolution by this Court. The Court should grant certiorari to clarify the standard under which standing claims are evaluated in Establishment Clause cases.

* * * *

As this Court observed in *Valley Forge*, "Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution . . . ." 454 U.S. at 475-76. Here, however, the district court and the court of appeals have treated standing as nothing more than a "troublesome hurdle." The effect of their ruling is to impose the additional burden of litigation on a university whose limited resources would be better allocated to educating students. The Court should grant certiorari to correct that error and to clarify the application of Article III in cases involving claims of municipal and state taxpayer standing raised under the Establishment Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN P. WILSON
JAMES W. WHITE
WALLER LANDSEN DORTCH & DAVIS
Nashville City Center
Suite 2100
511 Union Street
Nashville, Tennessee 37219

REX E. LEE *
CARTER G. PHILLIPS
SUSAN A. WEBER
ERIC H. SUSSMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

March 14, 1995

* Counsel of Record

APPENDICES

BEST AVAILABLE COPY

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-5350

HAROLD E. STEELE; DON PETERSON; REV. DAVID MAYNARD; HARMON WRAY; REV. TOM BAKER, JR.; and AMERICANS FOR RELIGIOUS LIBERTY,
Plaintiffs-Appellees,

v.

INDUSTRIAL DEVELOPMENT BOARD OF METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY; METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY; DAVID LIPSCOMB UNIVERSITY; SOVRAN BANK; and SOVRAN BANK/TENNESSEE,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Tennessee

[Filed November 1, 1994]

BEFORE: JONES, NORRIS, and DAUGHTREY, Circuit Judges.

PER CURIAM: This interlocutory appeal presents a single issue for our resolution: whether the individual plaintiffs have standing to challenge the issuance of tax-exempt educational revenue bonds to defendant David Lipscomb University, a concededly sectarian institution

run by the Church of Christ in Nashville, Tennessee. The district court held that the plaintiffs have standing to sue as municipal taxpayers and therefore denied the defendants' motion for summary judgment. We conclude that the record supports this result and affirm.

In a well-stated and well-reasoned memorandum opinion, the district court determined, correctly, that the standing issue in this case is controlled by this court's opinion in *Hawley v. City of Cleveland*, 773 F.2d 736 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). In *Hawley*, we held that municipal taxpayers had standing to raise an Establishment Clause challenge to city policies that affect the city's fisc, even though no tax dollars would be expended directly on the project in issue. The *Hawley* plaintiffs, suing as municipal taxpayers, claimed that the city had leased space to the Catholic Diocese of Cleveland to establish and maintain a chapel in the Cleveland airport at substantially less than the market value of the space, resulting in a loss of revenue to the city's general fund. We held in *Hawley* that this allegation was sufficient to "give [plaintiffs] standing as municipal taxpayers to defend the public treasury." *Id.* at 741.

Here, the district court concluded that "[t]he issuance of tax-exempt bonds to the University will reduce the revenue flowing from the Metropolitan Government's coffers since otherwise, the University would have turned to taxable means to fund the project." On appeal, as below, the defendants claim that without the lower interest rates resulting from tax-exemption, the University could not have afforded to go forward with plans for a $32 million expansion of the Nashville campus. But the district court found that "plaintiffs have put forth enough evidence to establish the likely chance that the University would have financed at least part of the expansion through a taxable vehicle," especially in light of testimony by the University's chief fiscal officer concerning pressure by the University's accreditors to build a new library and student center. The

district judge concluded, based on the record as a whole, that the plaintiffs had established standing under *Hawley* to bring suit as municipal taxpayers.

The district court also relied on *Hunt v. McNair,* 413 U.S. 734 (1973), in which the Supreme Court invalidated a South Carolina law permitting the issuance of industrial revenue bonds "to assist institutions of higher education in the construction, financing and refinancing of projects" to the extent that it permitted issuance of such bonds on behalf of a religious college. As in this case, the bonds in *Hunt v. McNair* were tax-exempt and did not constitute an obligation on the part of the state either directly or indirectly. The Court nevertheless described the bond issue as "state aid" of "a very special sort." *Id.* at 745 n.7. Although the standing of the plaintiffs in *Hunt v. McNair* was not litigated as such, the Supreme Court has, in subsequent cases, cited to *Hunt* as a basis for finding standing. *See, e.g., School District of Grand Rapids v. Ball,* 473 U.S. 373, 380 N.5 (1985), and *Bowen v. Kendrick,* 487 U.S. 589, 619 (1988).

Based on the findings of fact and legal reasoning employed by the district court in its memorandum opinions of July 16, 1992, and November 16, 1992 (on motion to reconsider), we AFFIRM the district court's order denying summary judgment to the defendants, and REMAND the case for further proceedings.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Docket No. 3:91-0421

HAROLD E. STEELE, *et al.*

vs.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*

MEMORANDUM

[Filed July 16, 1992]

Plaintiffs, a group of state and municipal taxpayers, bring this declaratory judgment action seeking a declaration that the issuance of tax-exempt industrial revenue bonds by the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County for David Lipscomb University's campus expansion project violates the Establishment Clause of the First Amendment to the United States Constitution. Plaintiffs also seek to enjoin the future issuance of such bonds for sectarian educational institutions and to recover nominal damages for the alleged constitutional violation. Pending before the Court is the defendant's motion for summary judgment in which defendants argue that the plaintiffs lack standing to bring this suit.

I. BACKGROUND

David Lipscomb University is a private, co-educational liberal arts university, affiliated with the Church of Christ, with an enrollment of approximately 2500 students. As

a consequence of recommendations made by the Southern Association of Colleges and Schools in 1985, the University undertook to expand and redevelop certain of its campus facilities located in Nashville, Tennessee. In early 1991, the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County issued Educational Facilities Revenue Refunding Bonds (David Lipscomb University Project), Series 1991, in the aggregate principal amount of $15,000,000. The proceeds of the sale of the bonds were used to redeem an earlier series of bonds issued by the same board in 1990. The purpose of the Series 1990 and 1991 bonds was to finance the cost of constructing and equipping certain facilities on the University's campus, including a new library, athletics building, ball field, administration building, dormitory, dining hall, and facilities for a fine arts center, as well as parking.

The primary security for the bonds is a $15,969,453 irrevocable letter of credit issued by Sovran Bank/Tennessee for the account of the University to Sovran Bank, N.A., as trustee for the bondholders. Additional security is in the form of a promissory note and Loan Agreement between the University and the Industrial Development Board.

The bonds were issued by the Industrial Development Board pursuant to its authority under state law to issue bonds for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann. § 7-53-101(11)(A)(vii). Because interest earned on the bonds is tax-exempt, the University's financing costs are significantly lessened since it may offer the bonds at a lower interest rate and still remain competitive with taxable offerings in the bond market.

Although the Board is an instrumentality of the Metropolitan Government, the bonds do not constitute an indebtedness of either the Board or the Metropolitan Government. Neither the Board nor the Metropolitan Government can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance. Tenn. Code Ann. § 7-53-306. No state or local government tax revenues have been or will be spent as a result of the issuance of the bonds.

Plaintiffs claim standing to bring this action as citizens and as state and municipal taxpayers. They assert that as citizens and taxpayers, they have an interest that their local governmental body not subsidize religious institutions. It is further alleged that the tax base of the state and local government is reduced by the issuance of tax-exempt bonds and therefore tax dollars are indirectly being expended on behalf of a pervasively religious institution. Plaintiffs argue that had the tax-exempt bonds not been issued, the University would have financed all or part of the project through the use of a taxable bond offering. Defendants respond by arguing that no tax dollars were spent in issuing the bonds and that had the tax-exempt bonds not been provided to the University, the University could not have afforded to finance the expansion through a taxable bond offering. Thus, defendants claim that no tax money has been spent or lost, directly or indirectly, as a result of the bonds and therefore the plaintiffs lack standing as taxpayers.

II. DISCUSSION

Article III of the Constitution limits the judicial power of the United States to the resolution of "cases" and "controversies." One requirement for any "case or controversy" is that the parties involved have standing to bring the action. As the Supreme Court observed in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758 (1982),

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1608, 60 L.Ed.2d 66 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Plaintiffs allege in their complaint that they have standing both as citizens who possess an interest in seeing that their state and local governments not subsidize religious institutions and as state and municipal taxpayers who claim to be indirectly subsidizing the University when the state and local governments provide the school with tax-exempt bonds.

A. Taxpayer Standing.

The case law governing taxpayer standing issues is plagued by fine distinctions and vague standards. Part of the complexity of the doctrine results from the number of taxpayer categories which must be considered. The rules governing taxpayer standing vary depending upon whether an individual sues as a federal, state, or municipal taxpayer. The sort of claim alleged also affects the standing analysis. Thus, cases pronouncing standards for taxpayer standing in Establishment Clause cases must be treated separately from other actions.

In the seminal case of *Frothingham v. Mellon*, 262 U.S. 447, 43 S. Ct. 597 (1923), the Supreme Court held that the [*sic*] an individual does not have standing to challenge acts of Congress solely on the basis of that individual's status as a federal taxpayer. The Court observed that the injury suffered by an individual taxpayer as a result of

Congress' challenged action was to[o] remote to constitute a sufficient basis for alleging a claim.

> The party who invokes the power [of judicial review] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488, 43 S. Ct. at 601.

The holding of *Frothingham* was expressly limited to *federal* taxpayer suits. The Court itself distinguished federal and municipal taxpayer actions.

> The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court. . . . But the relation of a taxpayer of the United States to the federal government is very different.

Id. at 486-87, 43 S. Ct. at 601.

In *Doremus v. Board of Education*, 342 U.S. 429, 434, 72 S. Ct. 394, 397 (1952), the Court found that a state taxpayer may have standing to challenge state conduct, but "only when it is a good faith pocketbook action." *Doremus* required that taxpayers show an actual "direct dollars-and-cents injury." Although *Doremus* involved a facial challenge to a state statute on Establishment Clause grounds, the Court made no mention of any special status accorded to Establishment Clause cases. It was not until *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942 (1968), that the Court explicitly recognized the need for treating Establishment Clause suits differently.

Flast held that a federal taxpayer does have standing to invoke federal judicial power when he alleges that "con-

gressional action under the taxing and spending clause [Art. I, § 8] is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power." *Id.* at 106, 88 S. Ct. at 1955. The Court has continued to adhere to the *Flast* exception, although in *Valley Forge, supra,* the Court limited *Flast* to the narrow circumstances w[h]ere the challenged action is in fact congressional conduct, and where the property transfer was an exercise of the taxing and spending clause of Art. I, § 8. *See Bowen v. Kendrick,* 487 U.S. 589, 618-19, 108 S. Ct. 2562, 2579 (1988).

The distinction between federal and state taxpayer suits has been substantially blurred in recent years. The Sixth Circuit has equated *Frothingham's* standing test for federal taxpayers with Doremus' test for state taxpayers.

> We conclude that the requirements for federal taxpayer standing announced in *Frothingham* control the issue of state taxpayer standing, at least in those cases where violation of the Establishment Clause is not alleged. . . . In order to have standing, a state taxpayer must allege direct and palpable injury with sufficient specificity to meet the 'good-faith pocketbook' requirement of *Doremus.*

Taub v. Kentucky, 842 F.2d 912, 918 (6th Cir.), *cert. denied,* 488 U.S. 870 (1988). Similarly, the Supreme Court in *ASARCO Inc. v. Kadish,* 490 U.S. 605, 613-14, 109 S. Ct. 2037, 2043 (1989), "likened state taxpayers to federal taxpayers, and thus . . . refused to confer standing upon a state taxpayer absent a showing of 'direct injury' pecuniary or otherwise." (quoting *Doremus,* 342 U.S. at 434, 72 S. Ct. at 397).

However, the courts have more readily recognized municipal taxpayer suits to be appropriate and therefore hold municipal taxpayers to a lower threshold for standing. *See Taub, supra,* at 917. The Sixth Circuit, in *Hawley v. City of Cleveland,* 773 F.2d 736, 740-41 (6th

Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986), held that municipal taxpayers could have a basis for standing to raise an Establishment Clause challenge to city policies which affect the city's general revenue fund even though no tax dollars would be expended from the putatively improper conduct.[1] In *Hawley*, the municipal taxpayer plaintiffs claimed that the city had leased space to a religious organization at substantially less than the market value with a resultant loss of revenue to the city's general fund. The court found that if this claim was true, "this allegation could give appellants standing as municipal taxpayers to defend the public treasury." *Id.* at 741.[2]

In the case at hand, plaintiffs allege a similar status and injury. Plaintiffs bring this action as state and municipal taxpayers who seek to defend the public treasury. The issuance of tax-exempt bonds to the University will reduce the revenue flowing into the Metropolitan Gov-

---

[1] The Supreme Court recognized in *Bob Jones University v. United States*, 461 U.S. 574, 591, 103 S. Ct. 2017, 2028 (1983), that "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of exemption or deduction . . . means that other taxpayers can be said to be indirect and vicarious [']donors.[']"

[2] Another court to find municipal taxpayer standing where no tax dollars were spent, but where the municipality in effect subsidized a religious organization can be found in *Foremaster v. City of St. George*, 882 F.2d 1485, 1487-88 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990). In *Foremaster*, the Utility Department of the City of St. George, Utah, credited the electric bill of the Temple of the Church of Latter Day Saints approximately $180 per month to help defray the costs of illuminating the exterior of the temple at night. Although the credit merely reduced the temple's electric bill and no tax dollars were directly being spent, the court found taxpayer standing because "[t]o the extent that this subsidy diminished total revenues for the City's Utility Department, the Utility Department and the purchasers of municipal electricity are less well off and those purchasers may very well pay higher rates." *Id.* at 1487.

ernment's coffers since otherwise, the University would have turned to taxable means to fund the project. Although defendants claim that without the tax-exemption, the University could not have afforded to proceed with the project, the Court believes that plaintiffs have put forth enough evidence to establish the likely chance that the University would have financed at least part of the expansion through a taxable vehicle.[3] Therefore, under *Hawley*, the Court finds that plaintiffs have standing to sue as municipal taxpayers.

Yet another basis can be put forth for standing in this instance. The Supreme Court has consistently recognized a low threshold for state taxpayer standing in Establishment Clause cases, particularly when the state aid challenged is flowing to nonpublic schools. In *Hunt v. McNair*, 413 U.S. 734, 93 S. Ct. 2868 (1973), the Court was faced with a virtually identical factual situation. There, the Court was called upon to determine the constitutional[ity] of a South Carolina law which permitted the issuance of industrial revenue bonds "to assist institutions of higher education in the construction, financing and refinancing of projects." *Id.* at 736, 93 S. Ct. at 2871. Some of these bonds were issued in support of a religious college. As in the case at bar, the bonds issued were tax-exempt, and did not constitute an obligation on the part of the State, directly or indirectly. The Court observed that this sort of "state aid" was "of a very spe-

[3] In support of this conclusion, the Court finds that the University was under pressure from the Southern Association of Colleges and Schools, the association which accredits the University, to improve the school's facilities. The University had used non-tax-exempt financing for other projects in the past. Charitable donations and student enrollment at the University had fallen off in the late 1980s and into 1991. Although the University may not have been able to afford to finance the entire $15 million project through taxable offerings, the Court believes that the University would most likely have turned to taxable means for at least part of the expansion. Under *Hawley* and *Foremaster*, the Court believes that this states a sufficient basis for standing.

cial sort." *Id.* at 745 n.7, 93 S. Ct. at 2875 n.7. The Court characterized the tax-exempt bonds as follows:

> We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available.

Id. Nevertheless, the Court characterized the issuance of such tax-exempt bonds as "state aid" and reached the merits of the taxpayer's suit without even questioning standing.

Although reliance upon the Court's silence in this regard would normally be a poor basis for extrapolating a taxpayer standing test,[4] the fact that the Court, in subsequent cases, has cited to *Hunt* as a basis for standing does render *Hunt* good authority on the standing issue. In *School District of Grand Rapids v. Ball,* 473 U.S. 373, 380 n.5, 105 S. Ct. 3216, 3220 n.5 (1985), the Court found taxpayers had standing to challenge certain school district expenditures which were alleged to violate the Establishment Clause. In affirming the lower courts' finding of standing, the Court "rel[ied] on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to program for aiding nonpublic schools." *Id.* (citing, inter alia, *Hunt*).

---

[4] But see *Murray v. City of Austin,* 947 F.2d 147, 151 (5th Cir. 1991), *cert. denied,* —— S. Ct. —— (1992) (finding taxpayer standing and attaching "considerable weight to the fact that standing has not been an issue in the Supreme Court in similar cases").

In yet another case, the Court expressly cited to *Hunt* for the very proposition that *Hunt* impliedly found taxpayer standing. In *Bowen v. Kendrick*, 487 U.S. 589, 619, 108 S. Ct. 2562, 2579-80 (1988), Chief Justice Rehnquist noted that the Court has

> not questioned the standing of taxpayer plaintiffs to raise Establishment Clause challenges, even when their claims raised questions about the administratively made grants. See . . . *Hunt*, 413 U.S. at 735-36, 93 S. Ct. at 2870-71 (not questioning standing of state taxpayer to file suit against state executive in an 'as applied' challenge).

Although *Hunt* was not written as a standing case, it has become one through implication and therefore governs standing in this action. Accordingly, since the case at hand is factually indistinguishable from *Hunt*, the taxpayer plaintiffs have standing in this action. Moreover, under *Hunt*, it apparently make[s] no differnce whether or not plaintiffs can show a loss of revenue to the state or municipality or whether plaintiffs can show that tax dollars will be spent or lost. In *Hunt* itself, the Court observed that the state aid in question did not affect public finances in any way, and yet, the plaintiffs had standing to raise the Establishment Clause issue.

Defendants' reliance on *Flast, Valley Forge, Doremus,* and *Taub* is misplaced. *Flast* was a federal taxpayer suit, and has little applicability to municipal taxpayer cases. *See Colorado Taxpayers Union, Inc. v. Romer*, —— F.2d ——, ——, 1992 WL 101272, at *5 (10th Cir. May 15, 1992). *Valley Forge* was also a federal taxpayer suit, and the Court in *Bowen*, which cited to *Hunt* for standing, distinguished *Valley Forge*. *Bowen, supra*, at 618-19, 108 S. Ct. at 2579-80. Although *Doremus* involved a challenge brought under the Establishment Clause, the decision was handed down long before the Court recognized the special status of Establishment Clause cases. Thus, the Court treated the case as

any other taxpayer suit and therefore the holding has little precedential value for the case at hand.[5] Moreover, *Doremus* was a facial challenge to a state taxpayer suit and was in no way related to matters of public finance. Since the present case is an "as applied" challenge brought by municipal taxpayers, and the public finance is implicated, the standing considerations are clearly different. *See Frothingham, supra,* at 486-87, 43 S. Ct. at 601; *Taub, supra,* at 917; *Hawley, supra,* at 741. Finally, *Taub* was neither a municipal taxpayer case nor an Establishment Clause case, and the standing test formulated in *Taub* was expressly limited to *state* taxpayer cases in which a violation of the Establishment Clause is *not* alleged. *Taub, supra,* at 918.

Accordingly, under both *Hawley* and *Hunt,* this Court finds that plaintiffs have standing as taxpayers to bring this action and the Court will therefore deny the motion for summary judgment.

B. Citizen Standing.

Plaintiffs allege another basis for standing which the Court will briefly address. It is asserted by the plaintiffs that as citizens and taxpayers, they have an interest in seeing to it that their government not subsidize pervasively religious institutions. In support of this proposition, plaintiffs cite to *County of Allegheny v. ACLU,* 492 U.S. 573, 109 S. Ct. 3086 (1989); *Wallace v. Jaffre,* 472 U.S. 38, 105 S. Ct. 2479 (1985); and *ACLU v. City of Birmingham,* 791 F.2d 1561 (6th Cir.), *cert. denied,* 479 U.S. 939 (1986).

It is clear from the case law that standing may be based upon non-economic injury. *Valley Forge, supra,* at 486-87, 102 S. Ct. at 766. However, in all of the cases

---

[5] In fact, the Sixth Circuit, in *Taub,* adopted the *Doremus* test for standing in cases where a violation of the Establishment Clause is *not* alleged. *Id.* at 918.

finding standing to assert a non-economic injury, the plaintiff alleged some actual injury other than " 'the abstract injury in nonobservance of the Constitution asserted by . . . citizens.' " *Id.* at 482, 102 S. Ct. at 764 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n. 13, 94 S. Ct. 2925, 2933 n.13 (1974)). See also *In re U.S. Catholic Conference*, 885 F.2d 1020, 1024-25 (2d Cir. 1989), *cert. denied*, 495 U.S. 918 (1990).[6]

Plaintiffs allege that "the issuance of the tax-exempt revenue bonds by local governmental bodies is perceived as amounting to an endorsement of David Lipscomb University and its religious mission; and that this symbolic union of Church and State suggests that members of the Church of Christ are favored members of the political community to the exclusion of plaintiffs, who do not subscribe to those particular religious beliefs and practices." *Plaintiffs' Memorandum in Opposition to Motion for Summary Judgment*, at 34. There is no evidence before the Court that this "perception" is anything but imagined and the Court will not base standing on such a strained theory. Even if this "perception" of the plaintiffs is real, the Court does not believe that it states an injury sufficient to establish standing.

III. CONCLUSION

For the foregoing reasons, the Court finds that plaintiffs have standing as state and municipal taxpayers for two reasons. First, under Sixth Circuit precedent in *Hawley*, a municipal taxpayer may have standing to protect the public treasury. Second, under *Hunt*, state aid to non-public schools in the form of tax-exempt revenue bonds

[6] See *Foremaster v. City of St. George*, 882 F.2d 1485, 1490 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990); *Murphy v. Bilbray*, 782 F. Supp. 1420, 1426 (S.D. Cal. 1991); *Americans United for Separation of Church and State v. City of Grand Rapids*, 784 F. Supp. 403, 407 (W.D. Mich. 1990); *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1068 (M.D. Fla. 1989).

may be challenged by state taxpayers on Establishment Clause grounds.

An Order consistent with the reasoning herein will be entered contemporaneously with this Memorandum.

Entered this the 16th day of July, 1992.

/s/ John T. Nixon
JOHN T. NIXON
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:91-0421

HAROLD E. STEELE, *et al.*

vs.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*

MEMORANDUM

[Filed November 16, 1992]

Pending before the Court is defendant David Lipscomb University's Motion to Reconsider Order Entered July 16, 1992, or, in the alternative, for an Order Pursuant to 28 U.S.C. § 1292(b) Permitting Defendants to Apply to the United States Court of Appeals for Permission to Appeal the Order Entered July 16, 1992.

On July 16, 1992, the Court entered an order denying defendant Lipscomb's motion for summary judgment, finding that the plaintiffs have standing as state and municipal taxpayers. The Court has reviewed its decision in light of both defendant Lipscomb's and plaintiff's most recent arguments, as set forth in defendant's Memorandum of Law in Support of its Motion to Reconsider or for Permission to Appeal [Lipscomb's Memorandum], filed July 31, 1992, and plaintiffs' Response to Defendants' Supplemental Authority and Opposition to Plaintiffs' Objec-

tions and Amended Objections to Magistrate's Report and Recommendation [Plaintiffs' Response], filed July 16, 1992.

As stated in the Memorandum of July 16, 1992, the Court finds that the plaintiffs have municipal taxpayer standing under *Taub v. Kentucky*, 842 F.2d 912, 918 (6th Cir. 1988), *cert. denied*, 488 U.S. 870 (1988), and *Hawley v. City of Cleveland*, 773 F.2d 736, 740-41 (6th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). While defendant Liscomb argues that the injury in *Hawley* was not hypothetical and thus the case is distinguishable,[1] the Court does not agree with defendant's analysis. In *Hawley*, the court found that there was a question of fact as to whether the rental of space to the local Catholic diocese of Cleveland harmed Cleveland's fisc. In the instant case, the Court has found that there also exists a question of fact as to whether defendant Lipscomb would have turned to taxable vehicles to finance improvements, thus harming Nashville's fisc. In neither case is the existence of injury certain; however, the injury was no more definite—no less "hypothetical"—in *Hawley* than in the instant case. Further, the Seventh Circuit held in *ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986), that the test for standing is plaintiffs' good faith allegation of injury, not proof thereof.

The Court would also note that under several Supreme Court rulings, directness of injury has not been a requirement for standing. In a zoning ordinance case, *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the Supreme Court held that "the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights." *Warth* at 504-505, 95 S.Ct. at 2208. In *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), a case challenging a university's tax-exempt status on the grounds of its racially discriminatory admissions policy,

---

[1] Lipscomb's Memorandum at 5-6.

the Supreme Court specifically recognized that a government's grant of tax exemptions has an indirect effect on taxpayers.[2] Thus, with respect to the instant case, the Court finds that an indirect injury to plaintiffs would be sufficient to satisfy an Establishment Clause claim.

Another more recent Supreme Court ruling suggests to this Court that imminent threat of injury is not a requirement for standing. In *Lee v. Weisman,* No. 90-1014, slip op. (S.Ct. June 24, 1992), the Supreme Court held that the Establishment Clause forbids including clergy who offer prayers as part of an official public school graduation ceremony. The Supreme Court found that the plaintiff, personally and as next friend of his daughter, a member of a public middle-school graduating class in Providence, R.I., had standing on the grounds that there was a live and justiciable controversy: 1) the daughter was enrolled in a public high school in Providence at the time of oral argument; and 2) "it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation".[3] Implicit in this opinion, then, is that the underlying threat of injury need not be imminent, nor even absolutely certain. In *Weisman,* the Supreme Court found that the Establishment Clause protects a public high school student from being persuaded or compelled to participate in a religious exercise years hence; by analogy, this Court finds that the Establishment Clause protects plaintiffs from being compelled to support sectarian educational institutions through future tax increases.

Defendant further argues that the Court should grant its motion for summary judgment on the grounds that

---

[2] The Supreme Court stated: "When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors' ". *Bob Jones University* at 591, 103 S.Ct. at 2028.

[3] *Lee*[,] slip op. at 5.

plaintiffs have not presented sufficient evidence to argue that Lipscomb University would have resorted to the issuance of taxable bonds.[4] The Court does not agree with defendant's contention, particularly in light of the fact that the opposing party in a summary judgment motion is entitled to the most favorable inferences.[5] Plaintiffs have argued that the loss of tax revenue is neither conjectural nor hypothetical,[6] and they shall be allowed an opportunity to prove their allegation.

Defendant Lipscomb raises the issue of plaintiffs' failure to show that the alleged injury was a result of the actions of the governmental defendants.[7] However, in *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), the Supreme Court held that it did not matter that the violation of the Establishment Clause resulted from the action of private individuals where state government officially supported that activity:

> It does not matter that the posted copies of the Ten Commandments are financed by voluntary private contributions, for the mere posting of the copies under the auspices of the legislature provides the "official support of the State . . . Government" that the Establishment Clause prohibits.

Stone at 42, 101 S.Ct. at 194 (citations omitted). In other words, one may attribute to the Metropolitan Government of Nashville "official support" of the actions—

---

[4] Lipscomb's Memorandum at 2.

[5] "In ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962) (citations omitted).

[6] Plaintiffs' Response at 6.

[7] Lipscomb's Memorandum at 7.

taken by defendant Lipscomb—that caused the alleged loss of revenue. Further, *Stone* supports the proposition that plaintiffs need only prove a minimal tax subsidy.[8]

For the reasons given above, and in accordance with the reasoning set forth in the Court's Memorandum of July 16, 1992, the Court declines to reconsider its Order of July 16, 1992. However, pursuant to 28 U.S.C. § 1292(b), the Court hereby GRANTS defendant's Motion for an Order Permitting Defendants to Apply to the United States Court of Appeals for Permission to Appeal the Order Entered July 16, 1992.

Entered this the 16th day of November, 1992.

/s/ John T. Nixon
JOHN T. NIXON
Chief Judge
United States District Court

---

[8] In *Stone*, the only public money the state expended was in administering the contested statute that required the posting of copies of the Ten Commandments on the walls of each public school classroom in the state of Kentucky. *Stone*, at 42 n.4, 101 S.Ct. at 194 n.4.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:91-0421

HAROLD E. STEELE, *et al.*

VS.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*

ORDER

[Filed December 4, 1992]

By Order entered November 17, 1992, this Court denied defendant David Lipscomb University's Motion to Reconsider Order Entered July 16, 1992, but granted said defendant's alternative Motion for an Order Permitting Defendants to Apply to the United States Court of Appeals for Permission to Appeal the Order Entered July 16, 1992.

To enable defendants to pursue an interlocutory appeal of the Order entered July 16, 1992, the Court hereby AMENDS the July 16, 1992 Order by inserting therein the following statement, as prescribed by 28 U.S.C. § 1292(b).

> The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion

and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation.

Entered this the 4th day of December, 1992.

/s/ John T. Nixon
JOHN T. NIXON
Chief Judge
United States District Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:91-0421

HAROLD E. STEELE, *et al.*

v.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*

TO: Honorable John T. Nixon, Chief Judge

REPORT AND RECOMMENDATION

[Filed January 7, 1992]

This civil action was referred to the undersigned for all pretrial matters. Presently pending is the motion for summary judgment filed by the defendant David Lipscomb University on August 20, 1991. All other defendant parties have joined in the motion. Oral argument was heard December 12, 1991, and the following are my findings of fact, conclusions of law, and recommendation for disposition.

The plaintiffs, Americans for Religious Liberty ["ARL"], and five individual Tennessee citizens and taxpayers, have filed this civil action for declaratory judgment against the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County [hereinafter "Board"], David Lipscomb University

["Lipscomb"], Metropolitan Government of Nashville and Davidson County [hereinafter "Government"], Sovran Bank, and Sovran Bank/Tennessee.

The plaintiffs allege that the Board has issued $15 million dollars in tax-exempt educational revenue bonds for the benefit of Lipscomb, a pervasively sectarian institution, and they seek a court order to enjoin the Government from issuing these bonds for the benefit of other sectarian educational institutions.

This motion for summary judgment raises but one issue, and that is whether or not any of the plaintiffs have Article III standing to seek such an order. The defendants point out that the plaintiffs do not allege that they have suffered or will suffer any legally cognizable injury. The plaintiffs do allege they pay property and sales taxes, and thus have acquired state taxpayer standing, despite the fact that the plaintiffs do not allege that any property or sales tax revenues will be spent in connection with the bonds.

The defendants argue, and the plaintiffs concede, that no public funds have been spent in connection with the bonds, nor will any public funds be spent, nor are any public funds in jeopardy of being expended in the future in connection with the bonds involved here.

The purpose of the bonds was to finance the cost of constructing and equipping a library, athletic facilities, dormitories, dining hall, parking and fine arts facilities, as well as a business administration building. The bonds are secured by a letter of credit issued by Sovran Bank, and are issued pursuant to state statute T.C.A. § 7-53-101(11)(A)(vii) and do not constitute an indebtedness for the Board or the municipality. T.C.A. § 7-53-306. In addition, the bond documents prohibit the University from using the money for any religious purposes. The defendants argue that the plaintiffs do not have taxpayer standing to challenge the bonds issued herein.

The plaintiffs concede that their claim to standing rests solely on their status as state taxpayers, but assert that requirements for standing to challenge violations of the establishment clause are not as strict as the general standing principles. *Taub* v. *Commonwealth of Kentucky,* 842 F.2d 912, 917 (6th Cir. 1988). The plaintiffs, although conceding that no tax money is directly affected by the issuance of the bonds, contend that there is an indirect impact upon the plaintiffs as taxpayers because the purchasers of the bonds are not obligated to pay tax on the interest realized from the bonds which they otherwise would be obligated to pay if the bonds were a private transaction. Thus, the diminution in the tax monies accruing to the benefit of the government will eventually be an obligation that the taxpayers will have to make up in additional taxes. The plaintiff contends that *Hunt* v. *McNair,* 413 U.S. 734, 37 L.Ed.2d 923 (1973), holds that an indirect tax consequen[ce] is sufficient to establish taxpayer standing. The defendant argues that *Hunt* v. *McNai*[*r*] does not stand for the proposition stated by the plaintiff.

CONCLUSIONS OF LAW

In *Hunt,* the Supreme Court was not called upon to determine the plaintiff's standing to bring that establishment clause case. The entire discussion by the Court had to do with the merits of the First Amendment claim. 413 U.S. at 741-749.

On the other hand, in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952), the Court was concerned with the standing issue. The Court held that in order for an individual plaintiff to have standing as a state taxpayer, the plaintiff must allege, and prove, that he has "direct and palpable injury . . . a direct dollars and cents" injury with "sufficient specificity" to demonstrate that the lawsuit is a "good faith pocketbook action." *See also Taub* v. *Commonwealth of Kentucky,* 842 F.2d 912 (6th Cir. 1988).

In *Taub,* Kentucky, through its legislature, authorized the financing of lands purchased and improvements made through state revenue bonds for the construction of a Toyota assembly plant in Scott County, Kentucky. The plaintiff alleged that the actions of the legislature and the use of the proceeds of the state revenue bonds for this purpose violated Article I, Section 10, of the Constitution of the United States, and the First, Fifth and Fourteenth Amendments.

The Court reviewed the taxpayer standing decisions beginning with *Frothingham v. Mellon,* 262 U.S. 447, 67 L.Ed. 1078 (1923), through *Allen* v. *Wright,* 468 U.S. 737, 82 L.Ed.2d 556 (1984), and concluded as follows:

> We conclude that the requirements for federal taxpayer standing announced in *Forthingham* control the issue of state taxpayer standing, at least in those case where violation of Establishment Clause is not alleged. The rule upholding municipal taxpayer standing appears to rest on the assumption that the relatively small number of taxpayers involved and the close relationship between residents of the municipality and their local government results in a direct and palpable injury whenever tax revenues are misused. Whatever the validity of that assumption with respect to the larger cities today, we believe it has no force when a state is the defendant and the plaintiffs sue as state taxpayers. In order to have standing, a state taxpayer must allege direct and palpable injury with sufficient specificity to meet the "good faith pocketbook" requirement of *Doremus.*

842 F.2d at 918.

In *Hawley* v. *City of Cleveland,* 773 F.2d 736 (6th Cir. 1985), the Court was concerned with the standing issue with respect to a municipal taxpayer. In *Hawley,* the City of Cleveland, through its port control authority, had leased a portion of the airport premises owned by

the City of Cleveland, to the Catholic Diocese of Cleveland to be used as a non-denominational chapel for what was alleged to be a square foot rental value of less than the market value. The plaintiffs were taxpayers of the City of Cleveland, and sued to enjoin the lease of the airport premises. The district court, on motion to dismiss, dismissed for lack of standing. The court there discussed the case of *Valley Forge Christian College* v. *Americans United for Separation of Church and State,* 454 U.S. 464, 70 L.Ed.2d 700 (1982), and *Doremus* v. *Board of Education, supra.* With respect to the economic harm claimed by the plaintiffs there, the court stated as follows:

> [The plaintiffs] assert that the City's rental of space to the Diocese for what they contend is substantially less than market value would result in loss of revenue to the City's general fund through a reduction in the size of incentive payments. If true, this allegation could give appellants standing as municipal taxpayers to defend the public treasury. As we noted above, the record does not contain sufficient facts to enable us to determine whether the rental harms the public purse, or whether it actually helps it by resulting in the rental of property which otherwise could not be rented at all. Because this is a question of fact, it must be resolved in the first instance by the trial court. . . .

773 F.2d at 741.

The court then held that the trial court had erred in granting a motion to dismiss and remanded the case to determine if the municipal treasury was harmed by the lease of the premises at the airport to the Catholic Diocese. 773 F.2d at 742. The court held that whether a city taxpayer sustained economic injury entitling them to challenge the lease due to loss in payments made to the city from airport leases was a question of fact to be resolved in the trial court. *Id.*

The issue here is whether or not the plaintiffs have shown that the conversion of these bonds to tax exempt status harmed the municipal coffers. The plaintiffs concede that they have not submitted any such evidence in their documents and affidavits in opposition to the defendants' motion for summary judgment. For example, there is no proof that Lipscomb would have turned to private sector bonds to finance the improvements if the Board had not acted as it did. It could very well have been that Lipscomb may have decided not to finance the improvements in that manner, and instead raise the money through a donation campaign. We do not know. Plaintiffs had the burden to establish standing to pursue their claim.

It appears to me that there is no genuine issue of a material fact. There is no proof that the municipality was deprived of any tax collections as the plaintiff's assert. Under the above authorities, plaintiffs fail to establish that any of them have standing based on an indirect economic theory.

RECOMMENDATION

Based on the analysis above, I recommend that the defendants' motion for summary judgment be GRANTED and this civil action dismissed.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of service of this notice, and must state with particularity the specific portions of this Report, or the proposed findings or recommendation to which objection is made. Failure to file objections within the specified time waives the right to appeal the District Court's Order. *See Thomas* v. *Arn*, 474 U.S. 140 (1985); *United States* v. *Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,
/s/ [Illegible]

United States Magistrate Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-5350

HAROLD E. STEELE, *et al.*,
Plaintiffs-Appellees,

v.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*
Defendants,

DAVID LIPSCOMB UNIVERSITY,
Defendant-Appellant.

ORDER

[Filed December 14, 1994]

BEFORE: JONES, NORRIS, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX G

LOAN AGREEMENT

between

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

and

DAVID LIPSCOMB UNIVERSITY

Dated as of January 1, 1991

[Excerpt]

NOTE: THIS LOAN AGREEMENT HAS BEEN ASSIGNED TO, AND IS SUBJECT TO A SECURITY INTEREST IN FAVOR OF, SOVRAN BANK, N.A., AS TRUSTEE, PURSUANT TO AN INDENTURE OF TRUST DATED AS OF JANUARY 1, 1991, BETWEEN THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, AND SUCH TRUSTEE, AS AMENDED OR SUPPLEMENTED FROM TIME TO TIME. INFORMATION CONCERNING SUCH ASSIGNMENT AND SECURITY INTEREST MAY BE OBTAINED FROM SOVRAN BANK, N.A. IN ITS OFFICES IN RICHMOND, VIRGINIA.

* * * *

(r) Within six months of June 1, 1990, the Borrower made expenditures for costs of construction of buildings and acquisition of equipment, all of which form a portion of the Project, that in the aggregate are in excess of $100,000, Borrower promptly commenced the acquisition, construction and installation of the rest of the Project and has proceeded and will proceed therewith with due diligence until completion thereof. The Borrower will in any event complete such acquisition, construction and installation not later than May 31, 1993.

(s) The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

(t) The Borrower is not an institution in which religion is so pervasive that (i) the functions performed in the Project are not secular in nature, and (ii) a substantial portion of the Borrower's functions are subsumed in a religious mission.

(u) The Borrower is and will remain a Tax-Exempt Organization. The Borrower has received a determination letter from the Internal Revenue Service to the foregoing effect, which letter is in full force and effect. The Borrower does not have, and will not have, any "unrelated business taxable income" as defined in Section 512 of the Code which could have a material adverse effect on the University's status as a tax-exempt organization.

The Borrower shall comply with the provisions of subsections (c), (f), (g), (q) (r), (s), and (t) of this Section 5.3 following any termination of this Agreement and the payment in full of the Bonds to the extent necessary ot continue the exclusion of interest on the Bonds from gross income for federal income tax purposes and

to comply with the First Amendment of the Constitution of the United States and the coresponding provision(s) of the Constitution of the State of Tennessee, and to that extent such section shall survive termination of this Agreement and the payment in full of the Bonds.

Section 5.4. *Reference to Bonds Ineffective After Bonds Paid and Other Obligations Satisfied.* Upon the discharge of the Indenture, upon satisfaction of the rights of the Bank under the Indenture, and upon payment of all obligations under this Agreement and the Note, all references in this Agreement to the Bonds and the Trustee shall be ineffective, and neither the Trustee nor the holders of any of the Bonds shall thereafter have any rights hereunder except as provided in Sections 4.1(c), 5.1, 5.3 and 6.4 and except for such rights as may have theretofore vested or arisen from the Borrower's obligations hereunder.

* * * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 3-91-0421
Judge John T. Nixon

HAROLD E. STEELE, *et al.*,
Plaintiffs,

vs.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, *et al.*,
Defendants.

The deposition of JAMES C. ALLEN was taken before Henry S. Cross, Jr., Court Reporter and Notary Public at Large, on the 13th day of March, 1992, beginning at the approximate hour of 9:30 A.M., in the office of Mr. Michael Moore, Nashville City Center, Suite 2100, 511 Union Street, Nashville, Tennessee.

Taken by Agreement, for the purpose of producing evidence and/or for discovery, pursuant to the Federal Rules of Civil Procedure.

* * * *

Q. Okay. Well, what is the current indebtedness of the University now, when you consider the bond issue that we are talking about today, plus the previous indebtedness? What is a round figure? Are we talking 18 million?

A. I believe it's around 18 million.

Q. Okay. And besides these mandatory transfer funds, indicated on page 59, for the report for 1991, were there any other funds that were used to retire those debts?

A. No, sir.

Q. So all of the debt retirement would be coming from that portion of the operating budget?

A. That's correct.

Q. Okay. And is it your position, then, that the University has reached its maximum level of indebtedness that it can reasonably afford?

A. Today, you're talking about?

Q. Yes, sir.

A. Yes.

Q. If the University had been able to have more money available for debt service, would the University have elected to have a bond issue in an amount greater than $15 million?

A. I really don't know the answer to that. It would depend on a lot of different factors. That certainly would be one factor that would be necessary.

Q. Well, I guess it's sort of chicken and egg question, you know. Does the amount of money you have to finance the debt determine the amount of money you borrow, or is the cost of the project that you need to build what determines how much money you are going to borrow? Do you have any idea which was the stronger factor in this case?

A. One of the key financial ratios that I would be most concerned about would be the total debt amortization of the school, as a percent of the educational revenues of the school. There are certain guidelines you don't want that

to get in excess of, to be prudent. And we certainly would be concerned about that.

Q. Well, in 1991, the—again, it appears the majority of the sources of income for the operating budget came from tuition and fees. It looks like percentage figure of 61 percent. Is David Lipscomb increasing its enrollment or increasing its tuition annually, to reflect these larger numbers?

A. Yes, both.

Q. Both, okay. Does the University anticipate a tuition increase this next year?

A. Of one and one half percent.

Q. Is that pretty much in standard with the rest of the academic community in Middle Tennessee?

A. No, it's far below it.

Q. And in terms of student enrollment, is there an anticipated increase in students for next year?

A. We have budgeted it to be down 50 students for next year.

Q. So about the same number of students; maybe a little less.

A. That's correct.

Q. Each of these three reports that we have for the years 1989, 1990, and 1991, have on the page following the initial Table 8, have charts which break down the distribution of expenditures. And there is a mandatory transfer section for 1991. It says two percent. And for 1990, 3.9 percent; and for 1989, four percent.

So the percentage has actually gone down, in terms of that part of your operating budget, each year, committed to mandatory transfers.

A. That's correct. As I said earlier, for us to be able to embark on this $15 million bond issue, we would not have done it had we not decreased our total debt service by paying off other debts, because it would have put us in unacceptable areas regarding total debt amortization, relative to revenues.

* * * *

Q. If Industrial Development bonds had not been available to David Lipscomb University because of the church/state issues that we've been discussing today, would this same project have been subject to any financial restrictions that the University, or limitations the University had?

A. I'm sorry. I didn't understand that.

Q. Okay. If tax exempt financing, through the Industrial Development Board, had not been possible—

A. Okay.

Q. —would this same project have been financed in some other way?

A. Project.

Q. Yes.

A. Oh, okay. I'm sorry. No, it wouldn't have been. In fact, at the time that we made the request to Sovran, for instance, they had other products available, which we told them were not under consideration. Because, quite frankly, they would have put our percentage of debt amortization so much above what we could afford, that it just was not a consideration.

Q. Okay. So there is a direct tie-in, then, between this particular tax exempt financing package and the specific project that is being financed with that question is, was it necessary to do the projects?

A. It was not absolutely necessary. We desired to, but it was not absolutely—we were not under a gun, saying you have to do it.

Q. But you had some strong recommendations from the accreditation associations that these activities should be undertaken?

A. We had their strong recommendations, plus we had, you know, obvious knowledge that we needed those facilities, anyway.

Q. In what format did these recommendations occur, from the accreditation agency? Were they letters?

A. No, in their report, they [included] a recommendation section at the end of it, the study. And that was one of seven or eight recommendations that were made.

MR. MOORE: Which recommendation are we talking about?

MR. JOHNSTON: The recommendation, I guess, for the library facility and the student activity center, and the attendant spinoffs of those projects.

THE WITNESS: Well, there really weren't any attendant spinoffs to those projects, to the accreditation bureau.

* * * *

APPENDIX I

STATUTORY PROVISIONS

TENNESSEE CODE ANNOTATED

CHAPTER 53
INDUSTRIAL DEVELOPMENT CORPORATIONS

PART 1—GENERAL PROVISIONS

7-53-101. Definitions.—As used in this chapter, unless the context otherwise requires:

(1) "Bonds" means bonds, notes, interim certificates or other obligations of a corporation issued pursuant to this chapter;

* * * *

(7) "Loan agreement" means an agreement providing for a corporation to loan the proceeds derived from the issuance of bonds pursuant to this chapter to one (1) or more contracting parties to be used to pay the cost of one (1) or more projects and providing for the repayment of such loan by the other contracting party or parties, and which may provide for such loans to be secured or evidenced by one (1) or more notes, debentures, bonds or other secured or unsecured debt obligations of the contracting party or parties, delivered to the corporation or to the trustee under the indenture pursuant to which the bonds were issued;

(8) "Municipality" means any county or incorporated city or town in this state with respect to which a corporation may be organized and in which it is contemplated the corporation will function:

* * * *

(11) "Project" means all or any part of, or any interest in:

(A) Any land and building (including office building), any facility or other improvement thereon, and all real and personal properties deemed necessary in connection therewith, whether or not now in existence, which shall be suitable for the following or by any combination of two (2) or more thereof:

* * * *

(vii) Any nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including, but not limited to, classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities;

* * * *

7-53-102. Legislative intent and findings—Purposes of chapter—Construction.—(a) It is the intent of the general assembly by the passage of this chapter to authorize the incorporation in the several municipalities in this state of public corporations to finance, acquire, own, lease, and/or dispose of properties, to the end that such corporations may be able to maintain and increase employment opportunities, increase the production of agricultural commodities, and increase the quantity of housing available in affected municipalities by promoting industry, trade, commerce, tourism and recreation, agriculture and housing construction by inducing manufacturing, industrial, governmental, educational, financial, service, commercial, recreational and agricultural enterprises to locate in or remain in this state and further the use and production of its agricultural products and natural resources, and to vest such corporations with all powers that may be necessary to enable them to accomplish such purposes.

* * * *

(b) This chapter shall be liberally construed in conformity with such intention.

(c) The statement of public policy set forth in Acts 1955, chapter 209, § 3 is hereby incorporated into and

made a part of this chapter, and it is hereby determined and declared that the means provided by this chapter are needed to relieve the emergency created by the continuing migration from Tennessee of a large number of its citizens in order to find employment elsewhere and to control and eliminate all types of pollution within the state.

* * * *

PART 2—INCORPORATION

7-53-201. Application for incorporation—Qualifications of applicants—Certificate.—Whenever any number of natural persons, not less than three (3), each of whom shall be a duly qualified elector of and taxpayer in the municipality, shall file with the governing body thereof an application in writing seeking permission to apply for the incorporation of an industrial development board or corporation of such municipality, the governing body shall proceed to consider such application. If the governing body shall by appropriate resolution duly adopted find and determine that it is wise, expedient, necessary or advisable that the corporation be formed and shall authorize the persons making such application to proceed to form such corporation and shall approve the form of certificate of incorporation proposed to be used in organizing the corporation, then the persons making such application shall execute, acknowledge and file a certificate of incorporation for the corporation as hereinafter provided. No corporation may be formed unless such application shall have first been filed with the governing body of the municipality and the governing body shall have adopted a resolution as provided in this section.

PART 3—OPERATION AND POWERS

7-53-301. Board of directors.—The corporation shall have a board of directors in which all powers of the corporation shall be vested and which shall consist of any number of directors, not less than seven (7), all of whom shall be duly qualified electors of and taxpayers in the

municipality. The directors shall serve as such without compensation except that they shall be reimbursed for their actual expenses incurred in and about the performance of their duties hereunder. No director shall be an officer or employee of the municipality. The directors shall be elected by the governing body of the municipality, and they shall be so elected that they shall hold office for staggered terms.

* * * *

7-53-302. Corporate powers—Meetings public.—(a) The corporation has the following powers, together with all powers incidental thereto or necessary for the performance of those hereinafter stated, to:

(1) Have succession by its corporate name for the period specified in the certificate of incorporation, unless sooner dissolved as hereinafter provided;

(2) Sue and be sued and prosecute and defend, at law or in equity, in any court having jurisdiction of the subject matter and of the parties;

(3) Have and use a corporate seal and alter the same at pleasure;

(4) Acquire, whether by purchase, exchange, gift, lease, or otherwise, and improve, maintain, equip and furnish one (1) or more projects, including all real and personal properties which the board of directors of the corporation may deem necessary in connection therewith and regardless of whether or not any such projects shall then be in existence; provided, that no hotel, motel or apartment building shall be purchased or otherwise acquired by a corporation under the provisions of this subdivision after July 1, 1988, except that this proviso shall not affect the development or financing of any project which is located in a center city area or in a central business improvement district and which involves an apartment or residential building, hotel, motel or of any project acquired prior to July 1, 1988, regardless of when such

project is completed, nor shall this proviso be construed to impair, limit, abrogate or modify the contractual rights and obligations which any such corporation assumes with the issuance of any bonds, notes or other forms of indebtedness or any other contract; and provided further, that this proviso shall not apply to any hotel listed in the National Register of Historic Places acquired by the corporation prior to December 31, 1989;

(5) Lease to others one (1) or more projects and charge and collect rent therefor and terminate any such lease upon the failure of the lessee to comply with any of the obligations thereof; and include in any such lease, if desired, a provision that the lessee thereof shall have options to purchase any or all of its projects or that upon payment of all of the indebtedness of the corporation it may lease or convey any or all of its projects to the lessee thereof with or without consideration;

(6) Sell to others one (1) or more projects for such payments and upon such terms and conditions as the board of directors of the corporation may deem advisable, in accordance with the provisions of sale contracts entered into pursuant to this chapter;

(7) Enter into loan agreements with others with respect to one (1) or more projects for such payments and upon such terms and conditions as the board of directors of the corporation may deem advisable, in accordance with the provisions of this chapter.

(8) Sell, exchange, donate and convey any or all of its properties whenever its board of directors shall find any such action to be in furtherance of the purposes for which the corporation was organized;

(9) Issue its bonds, and otherwise borrow money from banks or other financial institutions by issuing its notes for the purpose of carrying out any of its powers;

(10) A security for the payment of the principal of and interest on any bonds or notes so issued and any

agreements made in connection therewith, mortgage and pledge any or all of its projects or any part or parts thereof, whether then owned or thereafter acquired, and pledge the revenues and receipts therefrom or from any thereof, and/or assign and pledge all or any part of its interest in and rights under the leases, sale contracts or loan agreements relating thereto or to any thereof;

(11) Employ and pay compensation to such employees and agents, including attorneys, as the board of directors shall deem necessary for the business of the corporation; and

(12) Exercise all powers expressly given in its certificate of incorporation and establish bylaws and make all rules and regulations not inconsistent with the certificate of incorporation or the provisions of this chapter, deemed expedient for the management of the corporation's affairs.

(b) The corporation shall not have the power to operate any project financed under this chapter as a business or in any manner except as specifically provided in this chapter, nor shall it have the power to pledge at any time or in any manner the general credit or taxing power of the municipality except as provided in § 7-53-306.

(c) Any meeting held by the board of directors for any purpose whatsoever shall be open to the public

7-53-303. Issuance of bonds—Restrictions on payment—Delivery—Additional issues—Redemption.—(a) Except as herein otherwise expressly provided, all bonds issued by the corporation shall be payable solely out of the revenues and receipts derived from the corporation's projects or of any thereof as may be designated in the proceedings of the board of directors under which the bonds shall be authorized to be issued, including debt obligations of the lessee or contracting party obtained from or in connection with the financing of a project; provided, that notes issued in anticipation of the issuance of bonds may be retired out of the proceeds of such bonds.

Such bonds may be executed and delivered by the corporation at any time and from time to time, may be in such form and denominations and of such terms and maturities, may be in registered or bearer form either as to principal or interest, or both, may be payable in such installments and at such time or times not exceeding forty (40) years from the date thereof, may be payable at such place or places whether within or without the state of Tennessee, may bear interest at such rate or rates payable at such time or times and at such place or places and evidenced in such manner, may be executed by such officers of the corporation and may contain such provisions not inconsistent herewith, all as shall be provided in the proceedings of the board of directors whereunder the bonds shall be authorized to be issued. If deemed advisable by the board of directors, there may be retained in the proceedings under which any bonds of the corporation are authorized to be issued an option to redeem all or any part thereof as may be specified in such proceedings, at such price or prices and after such notice or notices and on such terms and conditions as may be set forth in such proceedings and as may be briefly recited in the face of the bonds, but nothing herein contained shall be construed to confer on the corporation any right or option to redeem any bonds except as may be provided in the proceedings under which they shall be issued. Any bonds of the corporation may be sold at public or private sale in such manner, at such price and from time to time as may be determined by the board of directors of the corporation to be most advantageous, and the corporation may pay all expenses, premiums and commissions which its board of directors may deem necessary or advantageous in connection with the issuance thereof. Issuance by the corporation of one (1) or more series of bonds for one (1) or more purposes shall not preclude it from issuing other bonds in connection with the same project or any other project, but the proceedings whereunder any subsequent bonds may be issued shall recognize and protect any prior pledge or mortgage made for any prior issue of

bonds. Proceeds of bonds issued by the corporation may be used for the purpose of constructing, acquiring, reconstructing, improving, equipping, furnishing, bettering, or extending any project or projects, including the payment of interest on the bonds during construction of any such project and for two (2) years after the estimated date of completion, and payment of engineering, fiscal, architectural and legal expenses incurred in connection with such project and the issuance of the bonds, and the establishment of a reasonable reserve fund for the payment of principal of and interest on such bonds in the event of a deficiency in the revenues and receipts available for such payment.

(b) Any bond or notes of the corporation at any time outstanding may at any time and from time to time be refunded by the corporation by the issuance of its refunding bonds in such amount as the board of directors may deem necessary, but not exceeding the sum of the following:

(1) The principal amount of the obligations being refinanced;

(2) Applicable redemption premiums thereon;

(3) Unpaid interest on such obligations to the date of delivery or exchange of the refunding bonds;

(4) In the event the proceeds from the sale of the refunding bonds are to be deposited in trust as hereinafter provided, interest to accrue on such obligations from the date of delivery to the first or any subsequent available redemption date or dates selected, in its discretion, by the board of directors, or to the date or dates of maturity, whichever shall be determined by the board of directors to be most advantageous or necessary to the corporation;

(5) A reasonable reserve for the payment of principal of and interest on such bonds and/or a renewal and replacement reserve;

(6) If the project to be constructed from the proceeds of the obligations being refinanced has not been completed, an amount sufficient to meet the interest charges on the refunding bonds during the construction of such project and for two (2) years after the estimated date of completion (but only to the extent that interest charges have not been capitalized from the proceeds of the obligations being refinanced); and

(7) Expenses, premiums and commissions of the corporation, including bond discounts, deemed by the board of directors to be necessary for the issuance of the refunding bonds. A determination by the board of directors that any refinancing is advantageous or necessary to the corporation, or that any of the amounts provided in the preceding sentence should be included in such refinancing, or that any of the obligations to be refinanced should be called for redemption on the first or any subsequent available redemption date or permitted to remain outstanding until their respective dates of maturity, shall be conclusive.

(c) Any such refunding may be effected whether the obligations to be refunded shall have then matured or shall thereafter mature, either by the exchange of the refunding bonds for the obligations to be refunded thereby with the consent of the holders of the obligations so to be refunded, or by sale of the refunding bonds and the application of the proceeds thereof to the payment of the obligations to be refunded thereby, and regardless of whether or not the obligations to be refunded were issued in connection with the same projects or separate projects, and regardless of whether or not the obligations proposed to be refunded shall be payable on the same date or different dates or shall be due serially or otherwise.

(d) Prior to the issuance of the refunding bonds, the board of directors shall cause notice of its intention to issue the refunding bonds, identifying the obligations

proposed to be refunded and setting forth the estimated date of delivery of the refunding bonds, to be given to the holders of the outstanding obligations by publication of an appropriate notice one (1) time each in a newspaper having general circulation in the municipality with respect to which the corporation was organized and in a financial newspaper published in New York, New York, and having national circulation. As soon as practicable after the delivery of the refunding bonds, and whether or not any of the obligations to be refunded are to be called for redemption, the board of directors shall cause notice of the issuance of the refunding bonds to be given in the manner provided in the preceding sentence.

(e) If any of the obligations to be refunded are to be called for redemption, the board of directors shall cause notice of redemption to be given in the manner required by the proceedings authorizing such outstanding obligations.

(f) The principal proceeds from the sale of any refunding bonds shall be applied only as follows, either:

(1) To the immediate payment and retirement of the obligations being refunded; or

(2) To the extent not required for the immediate payment of the obligations being refunded, then such procedes shall be deposited in trust to provide for the payment and retirement of the obligations being refunded, and to pay any expenses incurred in connection with such refunding, but provision may be made for the pledging and disposition of any surplus, including, without limitation, provision for the pledging of any such surplus to the payment of the principal of and interest on any issue or series of refunding bonds. Money in any such trust fund may be invested in direct obligations of, or obligations the principal of and interest on which are guaranteed by the United States government, or obliga-

tions of any agency or instrumentality of the United States government, or in certificates of deposit issued by a bank or trust company located in the state of Tennessee, if such certificates shall be secured by a pledge of any of such obligations having any aggregate market value, exclusive of accrued interest, equal at least to the principal amount of the certificates so secured. Nothing herein shall be construed as a limitation on the duration of any deposit in trust for the retirement of obligations being refunded but which shall not have matured and which shall not be presently redeemable or, if presently redeemable, shall not have been called for redemption.

(g) All such bonds, refunding bonds and the interest coupons applicable thereto are hereby made and shall be construed to be negotiable instruments.

7-53-304. Security for payment of bonds—Default—Bondholders' remedies.—The principal of and interest on any bonds issued by the corporation shall be secured by a pledge of the revenues and receipts out of which the same shall be made payable, and may be secured by a mortgage or deed of trust covering all or any part of the projects from which the revenues or receipts so pledged may be derived, including any enlargements of and additions to any such projects thereafter made, and/or by an assignment and pledge of all or any part of the corporation's interest in and rights under the leases, sale contracts or loan agreements relating to such projects, or any thereof. The resolution under which the bonds are authorized to be issued and any such mortgage or deed of trust may contain any agreements and provisions respecting the maintenance of the projects covered thereby, the fixing and collection of rents or payments with respect to any projects or portions thereof covered by such resolution, mortgage or deed of trust, the creation and maintenance of special funds from such revenues and from the proceeds of such bonds, and the rights and remedies available in the event of de-

fault, all as the board of directors shall deem advisable not in conflict with the provisions hereof. Each pledge, agreement, mortgage and deed of trust made for the benefit or security of any of the bonds of the corporation shall continue effective until the principal of and interest on the bonds for the benefit of which the same were made shall have been fully paid. In the event of default in such payment or in any agreements of the corporation made as a part of the contract under which the bonds were issued, whether contained in the proceedings authorizing the bonds or in any mortgage and deed of trust executed as security therefor, such payment or agreement may be enforced by suit, mandamus, the appointment of a receiver in equity, or by foreclosure of any such mortgage and deed of trust, or any one (1) or more of such remedies.

7-53-305. Exemption from taxation—Payments in lieu of ad valorem taxes—Securities.—(a) The corporation is hereby declared to be performing a public function in behalf of the municipality with respect to which the corporation is organized and to be a public instrumentality of such municipality. Accordingly, the corporation and all properties at any time owned by it, and the income and revenues therefrom, and all bonds issued by it, and the income therefrom, shall be exempt from all taxation in the state of Tennessee. Also for purposes of the Securities Act of 1980, compiled as title 48, chapter 2, part 1, and any amendment thereto or substitution therefor, bonds issued by the corporation shall be deemed to be securities issued by a public instrumentality or a political subdivision of the state of Tennessee.

* * * *

7-53-306. Municipal liability—Submission to voters—Remedies of bondholders.—The municipality shall not in any event be liable for the payment of the principal of or interest on any bonds of the corporation, or for the performance of any pledge, mortgage, obligation or agreement

of any kind whatsoever which may be undertaken by the corporation, and none of the bonds of the corporation or any of its agreements or obligations shall be construed to constitute an indebtedness of the municipality within the meaning of any constitutional or statutory provision whatsoever. The municipality may pledge its full faith and credit as surety to the payment of the principal and interest of the bonds in the following manner:

(1) The governing body of the municipality may by resolution propose the pledging of the full faith and credit and unlimited taxing power of the municipality as surety to the payment of the principal and interest of the bonds. After securing a certificate of public purpose and necessity as provided in § 7-53-307, the governing body may direct the county election commission to hold an election for the registered voters of the municipality to determine whether the full faith and credit of the municipality shall be so pledged. Should three fourths (¾) of the voters cast their vote in favor of lending the municipality's credit by pledging the full faith and credit of the municipality to the payment, as surety, of the principal and interest of such bonds, according to the certificate of the county election commission, the municipality, through its governing board, would be authorized to so pledge its full faith and credit as surety and so indicate by the signature of the mayor or other chief executive official of the municipality on the bonds.

(2) In the event such pledge of full faith and credit and unlimited taxing power of the municipality is given, any holder or holders of the bonds, including a trustee or trustees for holders of such bonds, shall have the right, in addition to all other rights, by mandamus or other suit, action or proceeding in any court of competent jurisdiction to enforce such person's rights against the municipality, and the governing body of the municipality and any officer, agent or employee of the municipality, including, but not

limited to, the right to require the municipality and governing body and any proper officer, agent or employee of the municipality, to assess, levy and collect taxes and other revenues and charges adequate to carry out any agreement as to, or pledge of, such taxes, revenues and charges. The taxes herein authorized to be pledged shall be levied without limit as to rate or amount upon all taxable property within the municipality, and all such taxes to be levied are hereby declared to have been levied for county and corporation purposes, respectively, within the meaning of article II, § 29 of the Constitution of Tennessee.

CHAPTER 209

1955 TENNESSEE PUBLIC ACTS

* * * *

SECTION 3. *Be it further enacted,* That is is hereby determined and declared that the purpose of this Act is to do that which the State Welfare demands, and the State public policy requires:

(a) That the migration and loss of the people of Tennessee, who are compelled to leave the territorial limits of the State, daily, weekly, monthly and yearly to obtain employment and earn a livelihood be retarded and reduced.

(b) That the conditions of unemployment existing State-wide in Tennessee be relieved thereby reducing the evils attendant thereto.

(c) That the average family income in Tennessee be raised and increased as much as possible, but to an amount at least the average over the United States.

(d) That a means be provided for the citizens of communities to promote and develop industry in their areas, when it is impossible for them to do so in their separate and individual capacities.

(e) That a balanced economic development highly essential to the welfare of this State be promoted.

(f) That the reconversion from war time and civil defense economy to peace time pursuits be expedited by a program for readjustment of employment to accord with employment problems necessarily arising from changed conditions.

(g) That the present and prospective health, safety, morals, pursuit of happiness, right to gainful employment and the general welfare of the citizen demand as a public purpose, the development within Tennessee of commercial, industrial, agricultural and manufacturing enterprises by the several municipalities.

(h) That the means and measures herein authorized to promote said enterprises are, as a matter of public policy, for the public purposes of the several municipalities, and the State of Tennessee.

(i) That the present and prospective promotion of health, safety, morals, pursuit of happiness, right to gainful employment, and the general welfare of the State requires the measures that are herein and hereby authorized, and to that end will afford ready and attractive markets for farm and garden products, for the development of natural resources, and for the conversion of raw materials of farm, mine and forest into finished products for the general welfare of each of said municipalities, and the entire people of the State.

(j) That the accomplishment of the things herein authorized to be done by the several municipalities will give to them local benefits peculiar to each, and general benefits to the entire State.

TENNESSEE CODE ANNOTATED

CHAPTER 2

INCOME TAXATION

67-2-102. Imposition, rate and collection of tax.—An income tax in the amount of six percent (6%) per annum shall be levied and collected on incomes derived by way of dividends from stocks or by way of interest on bonds of each person, partnership, association, trust and corporation in the state of Tennessee who received, or to whom accrued, or to whom was credited during any year income from the sources above enumerated, except as hereafter provided.

67-2-119. Disposition of revenue.—(a) Of the taxes collected under the provisions of this chapter upon income from stocks and bonds taxable at the rate of six percent (6%) per annum, five-eighths (5/8) shall be paid into the general fund of the state treasury and the remaining three-eighths (3/8) shall be distributed among the cities and counties of the state.

(b) Where a taxpayer residing within the corporate limits of any municipality pays a tax imposed at the rate of six percent (6%) per annum, then three eighths (3/8) of the net tax collected from such taxpayer shall be returned to the city within which such taxpayer resides.

(c) Where a taxpayer residing in a county, but without the corporate limits of any municipality, pays a tax imposed by this chapter at the rate of six percent (6%) per annum, then three eighths (3/8) of the net tax collected from such taxpayer shall be returned to the county within which such taxpayer resides.

(d) In each instance, the payment to cities and counties covering collections made hereunder during any fiscal year shall be made on or before July 31 immediately following the close of that year.

(2)

No. 94-1519

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

IN THE

Supreme Court of the United States

October Term, 1994

DAVID LIPSCOMB UNIVERSITY,

Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Joseph H. Johnston #4706
Attorney at Law
P.O. Box 120874
Acklen Station
Nashville, Tennessee 37212
(615) 383-2119

May 13, 1995

Counsel for Respondents

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

28 pp

ALTERNATIVE QUESTION PRESENTED

Should the Court review the determination of the district court, affirmed by the court of appeals, that Defendant's motion for summary judgment on the issue of municipal taxpayer standing should be denied because there are genuine issues of material fact as to whether Plantiffs will suffer injury-in-fact from conduct of Defendant alleged to be in violation of the Establishment Clause?

TABLE OF CONTENTS

Page

Alternative Question Presented i

Table of Authorities iv

Additional Statutory Provisions Involved 2

Statement of the Case 2

Evidence of Material Facts 6

Brief and Argument 10

Reasons for Denying Certiorari 10

Conclusion 13

Appendix 1a

Appendix A 1a

Appendix B 2a

Appendix C 8a

TABLE OF AUTHORITIES

Page

Federal Cases:

ARASCO, Inc. v. Kadish,
490 U.S. 605 (1989) 10

Frothingham v. Mellon,
262 U.S. 447 (1923) 10

Hunt v. McNair,
413 U.S. 734 (1973) 2

Lynch v. Donnelly,
465 U.S. 668 2

Sierra Club v. Morton,
405 U.S. 727 (1971) .....

Valley Forge Christian College v. Americans United for Separation of Church and State,
454 U.S. 464 (1982) .....

State Cases:

Habel v. Industrial Development Authority,
400 S.E. 2d 516 (1991) 2

United States Constitution

Article III, Section 2 10

Tennessee Code Annotated

T.C.A § 67--2-101 6

T.C.A. § 67-2-102 6

Page

T.C.A. § 67-2-119 6

T.C.A. § 67--4-806(a) 2, 6

T.CA. § 67-4-813(a) 2, 6

IN THE

Supreme Court of the United States

October Term, 1994

No. 94-1519

DAVID LIPSCOMB UNIVERSITY,

Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Harold E. Steele, Americans for Religious Liberty, Rev. Tom Baker, Jr., Rev. David Maynard, Don Peterson, and Harmon Wray hereby submit the following Brief in Opposition to the Petition for a Writ of Certiorari filed by Petitioner David Lipscomb University to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by David Lipscomb University on pages 2 and 3 of its Petition, Respondents would include §§ 67-4-806 and 67-4-813 of the Tennessee Tax Code which appear in the Appendix at pages 1a and 2a.

STATEMENT OF THE CASE

Respondents, as municipal taxpayers[1] have challenged the issuance of a 15 million dollar ($15,000,000.00) tax-exempt educational facilities revenue bond by the Industrial Development Board of Metropolitan Nashville and Davidson County (Tennessee) to David Lipscomb University, a pervasively sectarian institution owned and operated by the Church of Christ in Nashville, Tennessee, on grounds that it has the "principal or primary effect" of advancing religion. *See Hunt v. McNair*, 413 U.S. 734 (1973); *Habel v. Industrial Development Authority*, 400 S.E. 2d 516 (1991).

Respondents, after discovery, produced evidence that David Lipscomb University was a pervasively sectarian institution and that its curriculum is subsumed in its religious mission; that the University was under pressure from the accreditation agency to build a new library and student center; that the University was experiencing some financial problems that made

[1]The individual Respondents have asserted their status as municipal taxpayers in their respective Supplementary Affidavits filed in opposition to the Motion for Summary Judgment. [R. 32, 35, 38, 40-41] *See Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed. 2d 604 (1984). Standing of Respondent Americans for Religious Liberty is derived from the municipal taxpayer standing of its members, Respondents Harold E. Steele and Don Peterson. *Sierra Club v. Morton*, 405 U.S. 727 (1971).

it difficult to finance its ten year expansion program relying on its past resources: charitable donations, tuition and commercial loans; that it applied to the Industrial Development Board for Metropolitan Davidson County for tax-exempt revenue bonds; that had tax-exempt revenue bonds not been available, it would have probably relied on non-tax-exempt bonds or commercial loans to finance part of its campus development which would have generated tax revenues from the interest that would accrue to the Metropolitan Government Fund via the Hall income tax or the Bank excise tax; and that in anticipation of litigation over this bond issue, the University has committed to pay an additional 2% interest premium to bond holders if the tax-exemption on the bonds is declared invalid.

David Lipscomb University moved for Summary Judgment on the grounds that Respondents lacked standing required under Article III, Section 2, of the United States Constitution to bring suit. After review of the affidavits, depositions, and other documents submitted in opposition to the motion, in the light most favorable to the non-moving party, the district court denied summary judgment and concluded:

> The issuance of tax-exempt bonds to the University will reduce the revenue flowing into the Metropolitan Government's coffers since otherwise, the University would have turned to taxable means to fund the project. Although Defendants claim that without the tax-exemption, the University, could not have afforded to proceed with the project, the Court believes that Plaintiffs have put forth enough evidence to establish a likely chance that the University would have financed at least part of the expansion through a taxable vehicle. Therefore, under *Hawley*, the Court finds that Plaintiffs have standing to sue as municipal taxpayers.

[Petition, pp. 10a-11a]

In a foot note, the district court summarized the evidence in the record which supported this conclusion.

> In support of this conclusion, the Court finds that the University was under pressure from the Southern Association of Colleges and Schools, the association which accredits the University, to improve the school's facilities. The University had used non-tax-exempt financing for other projects in the past. Charitable donations and student enrollment at the University had fallen off in the late 1980's into 1991. Although the University may not have been able to afford to finance the entire $15,000,000.00 project through taxable offerings, the Court believes that the University would most likely have turned to taxable means for at least part of the expansion. Under *Hawley* and *Foremaster*, the Court believes that this states a sufficient basis for standing.

[Petition, p. 11a, n.3]

In its memorandum on the University's motion to reconsider the district court summarized the essence of the factual dispute as follows:

> Defendant further argues that the Court should grant its motion for summary judgment on the grounds that plaintiffs have not presented sufficient evidence to argue that Lipscomb University would have resorted to the issuance of taxable bonds. The Court does not agree with defendant's contention, particularly in light of the fact that the opposing party in a summary judgment motion is entitled to the most favorable inferences. Plaintiffs have argued that the loss of tax revenue is neither conjectural nor hypo-

> thetical, and they shall be allowed an opportunity to prove their allegation.

[Petition, pp. 19a & 20a]

The Sixth Circuit Court of Appeals reviewed this issue on interlocutory appeal; and found sufficient evidence in the record to create genuine issues of material fact regarding Respondents' standing as municipal taxpayers. It affirmed the district court's ruling denying summary judgment, and remanded the case for further poceedings.

> Here, the district court concluded that: "[t]he issuance of tax-exempt bonds to the University will reduce the revenue flowing from the Metropolitan Government's coffers since otherwise, the University would have to turn to taxable means to fund the project." On appeal, as below, the defendants claim that without the lower interest rates resulting from tax-exemption, the University could not have afforded to go forward with plans for a $32,000,000.00 expansion of the Nashville campus. But the district court found that "plaintiffs have put forth enough evidence to establish the likely chance that the University would have financed at least part of the expansion program through a taxable vehicle," especially in light of testimony by the University's cheif fiscal officer concerning pressure by the University's accreditors to build a new library and student center.

[Petition, p. 2a]

David Lipscomb University disputes the district court's determination of the genuine issue of material fact of Plaintiffs' injury; i.e., the issuance of tax-exempt bonds to the University will reduce the revenue flowing into the Metro-

politan Government's coffers, by declaring that the court's conclusion, that the University would have turned to a taxable means to fund the project if the tax-exempt bond financing had not been available, is pure speculation. [Petition, p. 8] To accept the University's position, the Court would have to ignore the evidence in the record.

EVIDENCE OF MATERIAL FACTS

Contrary to the premise of David Lipscomb University that Respondents have presented no evidence setting forth specific facts demonstrating that the issuance of a $15,000,000.00 tax-exempt bond issue for its benefit will cause any loss of state or municipal tax revenues, the record contains affidavits, sworn deposition testimony, documents pulbished by the Industrial Development Board of Metropolitan Nashville and Davidson County, excerpts from the Tennessee Code Annotated, and other documents published by the Tennessee Department of Revenue, which demonstrate that the issuance of tax-exempt revenue bonds will cause a loss of state and municipal tax revenues which would otherwise have been collected as provided by bank excise tax, T.C.A. §§ 67-4-806 and 67-4-813, if David Lipscomb University had used commercial financing, or as provided by the Hall Income Tax, T.C.A. §§ 67-2-101, 67-2-102 and 67-2-119 if it had used taxable revenue bond financing.

The University was under "pressure" to build these two facilities. The University's had no choice but to proceed with development of a new library and student center because of the specific recommendations of the Southern Association of Colleges and Schools in 1985, which accredits institutions of higher education. Furthermore, Davide Lipscomb University adopted a strategic plan in 1989 to expand over the next 10 years to accommodate an increase in undergraduate enrollment from 2,250 to 3,000 students.

David Lipscomb University had utilized commercial bank loans in the past. According to Mr. James Allen, Vice-President for Business Affairs for David Lipscomb University, in the mid-1980's the University had borrowed 2.5 million dollars in the form of a commercial loan from Third National Bank in Nashville, Tennessee, to purchase an elementary school on Granny White Pike. The loan was for five years at an annual interest rate of 10 percent. This debt was retired early in 1989 by the University as a condition precedent for its application for tax-exempt revenue bond financing. In addition, the University also borrowed $400,000.00 via a taxable commercial loan in 1988 for the purpose of purchasing a telephone system through a vendor.

Sections of the Tennessee Code Annotated establishing the bank excise tax and Table N of the President's Annual Report for David Lipscomb University captioned "David Lispcomb University Notes and Bonds Payable" establish that interest on commercial loans by David Lipscomb University in the recent past have, in fact, generated taxable income to the State of Tennessee and Davidson County.

Not only was the University under pressure to expand its library and student center, it had financial problems as well. Most of the donors at David Lipscomb University are from the Middle Tennessee area. Because of the changes in federal tax law and the economy in Middle Tennessee in 1990, the total gifts to the University were down 10 percent. In 1991, student enrollment at David Lipscomb University dropped 8 percent, causing the University some serious financial concerns.

Sovran Bank's low floater program for marketing tax-exempt revenue bonds that was presented to the University was specifically aimed at small investors since the tax-exempt bonds were issued in $5,000.00 denominations affordable by donors to

David Lipscomb University. Sovran Bank also offered the University taxable bonds at a higher interest rate. However, the University saved 30 percent of the financing cost by utilizing tax-exempt revenue bonds instead of taxable bonds.

But for tax-exempt financing, the University would not have been able to finance its present campus development project, but might have done so on a smaller scale. The University's position that it could not have afforded to use conventional taxable financing for its campus development projects is belied by the fact that the University is presently guaranteeing each bond holder a two percent per annum annual payment in additional interest in the event the educational revenue bonds are declared to be subject to taxation.

Furthermore, had the University elected to pursue its campus development through the use of taxable educational revenue bonds, then purchasers of said bonds, issued in $5,000.00 denominations, would most likely reside in the Middle Tennessee area and, therefore, would have paid Hall state income tax on the interest received from said bonds. This tax revenue would then be allocated between state and counties where the bond holders resided. A reasonable inference is created that some bond holders reside in Davidson County, thereby causing some portion of the tax revenue to be apportioned to the Metropolitan Government.

The Biennial Report for 1989-90, published by the Tennessee Department of Revenue in January, 1991, shows the amount of tax revenues derived from the Hall income tax and the bank excise tax and the amount of these taxes distributed between the State of Tennessee and the Metropolitan Government of Nashville and Davidson County.

For the fiscal year 1990 tax revenues from the Hall income tax and the bank excise tax are described as follows:

Total income tax collected for the State of Tennessee, $102,953,687.00

Hall income tax distributed to Davidson County Fund: $1,813,268.00

Hall income tax distributed to Nashville Municipal Fund: $3,591,723.00.

Total excise taxes collected for the State of Tennessee: $332,035,741.

Excise tax distributed to Davidson County Fund: $811,908.00.

Thus in 1990, municipal taxes of the Respondents were supplemented to the tune of $6,216,899.00 if the income tax and excise tax received by the Metropolitan Nashville and Davidson County funds are added together.

Therefore, evidence in the record creates a genuine issue of material fact as to whether or not David Lipscomb University would have had to construct a new library and student center to maintain its academic accreditation, and as to whether or not the University had tax-exempt revenue bonds not been available, would have used either non-tax-exempt revenue bonds sold to its main group of supporters which resides in Middle Tennessee, which would have generated state income tax revenues on interest generated by those bonds, or commercial loans from local financial institutions, such as Third National Bank, which would have generated bank excise tax revenues on interest paid by David Lipscomb University on those loans.

The above tax revenues are not hypothetical, nor are they conjectural. Anytime that a taxpayer is exempted from payment of said taxes, the logical result would be that the loss of tax revenue will be offsert by a commensurate increase in

the tax burden or respondents as municipal taxpayers. Given the significant amount of tax revenue generated for state and local government from these sources, the effect of the issuance of tax-exempt revenue bonds on the tax burden of Respondents' likewise cannot be viewed as hypothetical or conjectural.

BRIEF AND ARGUMENT

REASONS FOR DENYING CERTIORARI

Taxpayer Interest in Municipal Revenues

Review should be denied because this case presents no legal issues, let alone one on which the circuits are divided nor one in which the Sixth Circuit is in conflict with a decision of this Court.

The Court has long recognized that municipal taxpayers have standing where it is shown that the peculiar relationship of the corporate taxpayer to the [municipal] corporation makes the taxpayer's interest in the application of municipal revenue "direct and immediate." *ARASCO, Inc. v. Kadish*, 490 U.S. 605, 613 (1989), citing *Frothingham v. Mellon*, 262 U.S. 447 (1923).

Thus, not only is the question presented neither novel nor important, but the parties essentially agree on the standard to be applied in determining whether respondents have standing; the only question is whether the district court correctly denied petitioner's motion for summary judgment because it found that there were genuine issues of material fact in dispute.

Respondents, as municipal taxpayers, have met the requisites for Article III standing articulated in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

(1.) Injury to Plaintiffs. The denial of municipal tax revenue to Metropolitan Government by issuance of tax

exempt educational facilities bonds for a pervasively sectarian institution results in a decreased municipal tax base and thus a commensurate increase or threatened increase in the Respondents' municipal taxes.

(2.) Causation. The tax-exempt revenue bonds issued to David Lipscomb University are exempt from the Hall state income tax which generates tax revenue on bond interest at a rate of 6% that is shared by the state on a pro rata basis with the Metropolitan Government. Had tax-exempt bond financing not been available, the University would likely have resorted to taxable means in the form of taxable revenue bonds or taxable commercial loans to finance at least part of its project because of pressure from the Southern Association of Colleges and Schools to build a new library and student center. Thus, the issuance of tax exempt educational facilities revenue bonds caused a decrease in the tax revenues that would have otherwise been generated from the financing at least part of this campus development project by the University.

(3.) Redressability. Evidence in the record is that the University is prepared to protect bond holders from any tax penalty and interest if the tax exemption on the revenue bonds is declared invalid.

Thus, the issues with respect to standing are not legal, but factual. If review were granted, the principal task of the Court would be to repeat what the Sixth Circuit did on interlocutory appeal: examine the record with great care to see whether the district court erred. At the end it would undoubtedly find, as did the court of appeals, that the district court was well within its discretion in denying Petitioner's motion for summary judgment. That denial was upheld not because the lower courts sided with Respondents on the legal issues, but because they carefully examined the factual record and found that the question of whether the municipality would have gained tax

revenues, if Petitioner had financed its campus development commercially, instead of on a tax-free subsidy basis, could not be answered on a motion for summary judgment, but required a trial.

If this Court were to grant review, the result would simply be a ruling of use only to the parties to this case. There is no difference of opinion on the legal issues, nor on the standard for granting summary judgment. The law is clear and the only issue is whether respondents have met their evidentiary burden necessary to avoid summary judgment. That is the kind of decision that district courts make every day, and there is no reason to believe that the district court here, both initially and on rehearing, did not carefully consider all of the evidence and reach the proper result. And even if it erred, which it plainly did not, and even if the court of appeals should have overturned that ruling, which it should not have, the function of this Court is not to sit to correct errors, especially the kind of factual errors that petitioner claims occurred here.

Finally, it should be recalled that discovery has been taken, and the case is ready for a trial, which is estimated to last only two (2) days. If, in fact, respondents lack the evidence needed to establish standing, the trial judge can dismiss the case after plaintiffs have rested, or, failing that, the court of appeals can reverse on appeal. Thus, even if there is an error that should be corrected, this is not the Court, nor is this the appropriate stage of the proceedings, for that to take place. Review should be denied.

CONCLUSION

The issue of municipal taxpayer standing is a simple factual dispute and is not ripe for review by the Court. Thus, there is no reason to grant certiorari in this case.

Respectfully submitted,

JOSEPH H. JOHNSTON #4706
Attorney at Law
P.O. Box 120874
Acklen Station
Nashville, Tennessee 37212
(615) 383-2119)

APPENDIX A

Additional Statutory Provisions

Tennesse Code Annotated

Section 67-4-806. *Tax Imposed.* - (a) All corporations, cooperatives, joint stock associations, and business trusts, including regulated investment companies and real estate investment trust, organized for profit under the laws of this state or any other state or counry and doing business in Tennessee, including state chartered banks and national banks doing business in Tennessee and including state chartered savings and loan associations and federally chartered savings and loan associations doing business in Tennessee shall, without exception other than as provided herein, pay the commissioner of revenue, annually, an excise tax, in addition to all other taxes, equal to six percent (6%) of the net earnings for the next preceding fiscal year for business done in this state.

Section 67-4-813. *Allocation - Banks* - (a) All taxes collected under this part shall be applied as follows:

(1) to cities and counties, an amount to be determined, allocated and administered in the following manner for each bank doing business in this state:

(A) three percent (3%) of the net earnings of the bank for the fiscal year second preceding the year in which the distribution under this section is made, less ten percent (10%) of the ad valorem taxes paid by the bank to its real property and tangible personal property for the fiscal year second preceding the year in which the distribution is made. For purposes of this subdivision, "net earnings" does not include amounts attributable to interest earned on bonds and other obligations of the state of Tennessee. The total amount thus determined shall be allocated between county and municipal governments where the principal office of the bank is located in the same proportion as the property tax rate of each such taxing jurisdiction shall bear to the sum of the property tax rate; . . .

APPENDIX B

In the United States District Court
for the Middle District of Tennessee
Nashville Division

Civil Action No. 3-91-0421

Judge John T. Nixon

Harold E. Steele, et al.,
Plaintiffs,

vs.

The Industrial Development Board of Metropolitan Government of Nashville and Davidson County, et al.,
Defendants.

The deposition of James C. Allen was taken before Henry S. Cross, Jr., Court Reporter and Notary Public at Large, on the 13th day of March, 1992, beginning at the approximate hour of 9:30 a.m., in the office of Mr. Michael Moore, Nashville City Center, Suite 2100, 511 Union Street, Nashville, Tennessee.

Taken by Agreement, for the purpose of producing evidence and/or for discovery, pursuant to the Federal Rules of Civil Procedure.

* * * *

Q. . . . Well, that description of the low floater bonds, is that the bonds that were ultimately put in place, in this last bond issue, by Sovran Bank?

A. It's the type of issue. Yes, sir.

Q. Okay. And the fact that the denominations are in five thousand dollars ($5,000.00) or less, is that

to make them attractive to individual investors, as well as institutional investors?

A. That is correct.

* * * * *

Q. Okay. I think earlier you may have made the statement that most of your donations come from the Middle Tennessee area. Do you remember making that statement?

A. That would be a generalization on my part. But that's correct. I would expect that to be the case.

* * * * *

Q. Okay. let me start again. How does the "tax-exempt status" of these bonds affect the amount of interest that David Lipscomb University has to pay?

A. (No response from witness.)

Q. Well, let me explain it. As opposed to non-tax-exempt bonds, for example. What is the difference?

A. The rate of interest would be lower, that is the ultimate effect.

Q. Okay. Now, can you explain for us why?

A. Because the individual doesn't have to pay tax on the income he receives. Therefore, he can receive a lower rate of interest and stil be at an equal or better position than he would have been otherwise, as an investor.

* * * * *

Q. All right. Why, for example, would the University want to expand its library, or to build a new library facility, as opposed to something else?

A. The school, it its annual — excuse me. Each 10 years, Southern Association of Colleges and Schools comes in to accredit and reaccredit the school.

In 1985, was their last visit. In that particular visit, they made two very strong recommendations that we construct a student activities building and a new library. They were badly needed.

There was not threat that we would lose our accreditation if we didn't, but over time, if you don't eventually keep up, then you could have some problems in that area. So those were our two highest priority facilities.

Q. Okay. And following those two facilities, what determined the next facilities that would be included with this phase one of this particular project?

A. The need of the various areas, in terms of facilities that we currently had and what we really needed.

Q. Okay. So there was a definite pressure to expand these particular facilities at this time; is that what you are saying?

A. Which facilities?

* * * * *

Q. Do you recall, generally, what some of these facilities are? You've got the baseball fields, obviously, and some things like that. But I think there's an Administration Building; is that one of those buildings?

A. There's a renovation of that — of the old library becoming the Administration Building.

Q. Right.

A. The only real "pressure" was to build those two facilities. The school had adopted a strategic plan which did call for ultimate growth of the school to 3,000 students.

* * * * *

Q. But you had some strong recommendations from the Accreditation Association that these activities should be undertaken?

A. We had their strong recommendations, plus we had, you know, obvious knowledge that we needed those facilities, anyway.

Q. In what format did these recommendations occur, from the accreditation agency? Were they letters?

A. No, in their report, they had a recommendation section at the end of it, the study. And that was one of seven or eight recommendations that were made.

MR. MOORE: Which recommendation are we talking about?

MR. JOHNSTON: The recommendation, I guess, for the library facility and the student activity center, and the attendent spin-offs of those projects.

THE WITNESS: Well, there really weren't any attendent spin-offs to those projects, to the accreditation bureau.

BY MR. JOHNSTON:

Q. Okay.

A. They were only saying that you need to have a student activities building and a library. We strongly recommend that. We didn't have to move the baseball field. We could have torn the houses down that were where the baseball field is, and put the library over there, if we had to.

Q. Okay. So it might have been done on a smaller scale, then?

A. Possibly.

* * * * *

Q. What other loan packages or finance packages are mentioned to you, at the time you were talking to Sovran Bank; do you recall?

A. The only one that was mentioned to me was Sovran had a similar program in taxable bonds. That was the only program that was ever mentioned to me.

Q. Would the interest that Lipscomb would have to pay on those taxable bonds be more than what it was paying on the tax exempt bonds?

A. Yes, sir.

Q. Okay. Can you recall the approximate differential?

A. Spread changes, depending on what level of interest rate you're talking about, as your beginning point.

Q. Okay.

A. I think you can presume, it's roughly thirty percent (30%) difference.

* * * * *

Q. So that would represent a substantial savings to the University, of thirty percent (30%), on its ability to finance this indebtedness.

A. And that's correct.

APPENDIX C

President's Report to Board of Directors
David Lipscomb University
October 5, 1991

David Lipscomb University Indebtedness
Table, Notes and Bonds Payable
1968-1991

DAVID LIPSCOMB UNIVERSITY

NOTES AND BONDS PAYABLE

	SHORT-TERM NOTES		LONG-TERM BONDS		LONG-TERM NOTES		
AUG 31	FIRST AMERICAN BANK	BIGGS TRUST	U.S. GOV'T	IDBonds	DLU SCHOLAR	FIRST AMERICAN BANK	THIRD NATIONAL BANK
1968	$2,700,000	$ -0-	$3,916,000	$ -0-	$ -0-	$ -0-	$ -0-
1969	2,415,670	-0-	3,901,000	-0-	-0-	-0-	-0-
1970	1,889,043	-0-	3,851,000	-0-	-0-	-0-	-0-
1971	1,645,459	-0-	3,801,000	-0-	-0-	-0-	-0-
1972	1,528,000	-0-	3,726,000	-0-	-0-	-0-	-0-
1973	2,250,000	-0-	3,650,000	-0-	-0-	-0-	-0-
1974	3,025,000	-0-	3,574,000	-0-	-0-	-0-	-0-
1975	3,100,000	-0-	3,497,000	-0-	-0-	-0-	-0-
1976	2,700,000	-0-	3,414,000	-0-	-0-	-0-	-0-
1977	3,150,000	-0-	3,326,000	-0-	-0-	-0-	-0-
1978	2,800,000	-0-	3,237,000	-0-	-0-	-0-	-0-
1979	2,650,000	-0-	3,147,000	-0-	-0-	-0-	-0-
1980	1,925,000	-0-	3,052,000	-0-	-0-	-0-	-0-
1981	800,000	175,000	2,956,000	-0-	-0-	-0-	-0-
1982	300,000	175,000	2,859,000	-0-	600,000	-0-	-0-
1983	1,200,000	175,000	2,756,000	-0-	597,682	408,333	-0-
1984	1,850,000	175,000	2,647,000	-0-	595,077	308,333	-0-
1985	400,000	300,000	2,538,000	-0-	592,150	208,333	-0-
1986	-0-	300,000	2,425,500	-0-	588,861	108,333	-0-
1987	375,000	300,000	2,304,500	-0-	585,166	961,668	1,908,038
1988	-0-	300,000	2,182,500	-0-	581,014	986,660	1,488,979
JULY 31							
1989	-0-	300,000	2,057,000	-0-	576,349	-0-	1,080,184
1990	-0-	300,000	1,928,000	15,000,000	571,107	-0-	268,025
	SOVRAN BANK						
1991	-0-	300,000	1,795,500	15,000,000	565,218	-0-	-0-

At July 31, 1991	Dorm Bonds 1966 (Fanning)	$124,000	3%	Maturing 1996
	Science Bldg Bonds 1966	234,000	3%	Maturing 1996
	Dorm/Stud Ser Bonds 1966	1,437,500	3%	Maturing 2006

Interest Rates

IDB - Industrial Development Board of Nashville Bonds	5.05% at July 31, 1991 14.5% Maximum permitted
First American National Bank	10.00% at July 31, 1990 10.50% at July 31, 1989 10.00% at August 31, 1988 8.25% at August 31, 1987 7.50% at August 31, 1986
Melissa Renee Biggs Memorial Trust	9.00% at July 31, 1991 9.00% at July 31, 1990 9.00% at July 31, 1989
Scholarship Fund	12.00% at July 31, 1991 12.00% at July 31, 1990 12.00% at July 31, 1989
Third National Bank	10.00% at July 31, 1990 10.00% at July 31, 1989 10.00% at August 31, 1988 8.50% at August 31, 1987

Supreme Court, U.S.
FILED
MAY 24 1995
CLERK

(3)

No. 94-1519

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DAVID LIPSCOMB UNIVERSITY,
Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF OF PETITIONER

JUSTIN P. WILSON
JAMES W. WHITE
WALLER LANSDEN DORTCH & DAVIS
Nashville City Center
Suite 2100
511 Union Street
Nashville, Tennessee 37219
(615) 244-6380

REX E. LEE *
CARTER G. PHILLIPS
SUSAN A. WEBER
ERIC H. SUSSMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

May 24, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

5 pp

TABLE OF AUTHORITIES

CASES

	Page
Allen v. Wright, 468 U.S. 737 (1984)	2
Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)	2, 3
Sierra Club v. Morton, 405 U.S. 727 (1972)	2
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	2
Warth v. Seldin, 422 U.S. 490 (1975)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1519

DAVID LIPSCOMB UNIVERSITY,
Petitioner,

v.

HAROLD E. STEELE; AMERICANS FOR RELIGIOUS LIBERTY; REV. TOM BAKER, JR.; REV. DAVID MAYNARD; DON PETERSON; HARMON WRAY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF OF PETITIONER

Contrary to respondents' contentions, petitioner David Lipscomb University is not asking this Court to revisit a routine, fact-based summary judgment decision. This case turns on a pure issue of law: Whether municipal taxpayers can establish standing on the basis of evidence that would not pass muster under ordinary Article III standards.

This Court has repeatedly held that, to establish Article III standing, a plaintiff must plead and prove, *inter alia*, injury-in-fact. This injury must be:

- concrete and particularized—*i.e.*, "the injury must affect the plaintiff in a personal and individual way,"
- "actual or imminent, not conjectural or hypothetical."

Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 & n.1 (1992) (internal quotations omitted) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Allen v. Wright*, 468 U.S. 737, 756 (1984); *Warth v. Seldin*, 422 U.S. 490, 508 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 740-41, n.16 (1972)); see also *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 489 (1982).

Here, however, the court of appeals held that respondents, as municipal taxpayers, need not meet these criteria. Rather, respondents could survive summary judgment simply by adducing evidence that they *might* suffer an *indirect* harm *if* certain contingencies arise. Pet. App. 2a, 10a-11a, 14a. Respondents explain their standing theory as follows:

> [E]vidence in the record creates a genuine issue of material fact as to whether or not David Lipscomb University would have had to construct a new library and student center to maintain its academic accreditation, and as to whether or not the University had tax-exempt revenue bonds not been available, would have used either non-tax-exempt revenue bonds sold to its main group of supporters which resides in Middle Tennessee, which would have generated state income tax revenues on interest generated by those bonds, or commercial loans from local financial institutions . . . which would have generated bank excise tax revenues on interest paid by David Lipscomb University on those loans.

Respondents' Brief in Opposition at 9; see also *id.* at 6. Nothing could more plainly reveal the convoluted and speculative nature of the chain of causation that respondents rely upon to demonstrate their standing.

The purported injury asserted by respondents—possible loss of municipal tax revenues that might accrue *if* David Lipscomb undertook certain construction projects *and* financed those projects through taxable vehicles—simply does not and cannot meet the requirements of a concrete, particularized, and actual or imminent injury. *Lujan*, 112 S. Ct. at 2136. It can only survive the lax municipal taxpayer standing criteria applied by the Sixth Circuit. App. 2a. Thus, the conflict in legal standards is squarely presented on the facts of this case, making it a particularly good vehicle for review of the question presented in the petition.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JUSTIN P. WILSON
JAMES W. WHITE
WALLER LANSDEN DORTCH & DAVIS
Nashville City Center
Suite 2100
511 Union Street
Nashville, Tennessee 37219
(615) 244-6380

REX E. LEE *
CARTER G. PHILLIPS
SUSAN A. WEBER
ERIC H. SUSSMAN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

May 24, 1995